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PARLIAMENTARY GOVERNMENT

IN

ENGLAND:

*ITS ORIGIN, DEVELOPMENT, AND PRACTICAL  
OPERATION.*

BY THE LATE

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*NEW EDITION, ABRIDGED AND REVISED*

BY

SPENCER WALPOLE,

AUTHOR OF "A HISTORY OF ENGLAND FROM 1815."

VOL. I.

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## PREFACE.

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DR. TODD, the author of the well-known work on *Parliamentary Government in England*, a condensed edition of which is now offered to the public in these volumes, is a remarkable instance of a man who, from small beginnings, and with few advantages, succeeded in combining long and valuable official service with literary labours of the highest value. Born in London in the early years of the reign of George IV., he was brought, a mere child of eight, to the colony of Canada. Thenceforward he received no education except that which he derived from his own studies; yet he qualified himself in this way to be chosen for the post of Assistant-Librarian of Upper Canada. When Upper and Lower Canada were united, he was continued in the same office by the Legislature of the United Provinces, and, in 1856, was promoted to the post of Chief Librarian. The library owed much to its librarian. A small and modest collection of less than 1000 volumes was developed, under his management, into a noble library. Twice destroyed by fire, the grant for restoring it was expended under his directions, and to his skill and judgment—to quote the words of an obituary notice in the *Ottawa Citizen*—"may be justly laid the main foundation of the present magnificent collection of 108,000 volumes." But the official labours which he thus discharged formed only a small portion of his service to the colony. In his own words, taken from the preface to the first volume of the first edition of this work, published in 1866—

"More than twenty-five years ago, when in the service of the House of Assembly of Upper Canada, as an assistant in the Provincial Library, I was induced to compile a manual of parliamentary practice for the use of the Legislature. The valuable treatise of Sir Erskine May, on the *Usage of Parliament*, had not then appeared ; and no work then published was sufficiently elementary and comprehensive to be of any service to our colonial legislators in the performance of their parliamentary duties. My little volume, although the crude and imperfect production of a very young man, was received with much favour by the Canadian Parliament. At the first meeting of the Legislature of United Canada, in 1841, the book was formally adopted for the use of members, and the cost of its production defrayed out of the public funds.

"It was in the same year, and immediately after the union of the two Canadas, that 'responsible government' was first applied to our colonial Constitution. In carrying out this new, and hitherto untried, scheme of colonial government, many difficult and complex questions arose, especially in regard to the relations which should subsist between the popular chamber and the ministers of the crown. Upon these questions, my known addiction to parliamentary studies, together with my official position as one of the librarians of the Legislative Assembly, caused me to be frequently consulted. I speedily became aware that then, as now, no work previously written on the British Constitution undertook to supply the particular information required to elucidate the working of 'responsible' or 'parliamentary' government. For, all preceding writers on this subject have confined themselves to the presentation of an outside view, or general outline, of the political system of England. There is nowhere to be found a practical treatment of the questions involved in the mutual relations between the crown and parliament, or any adequate account of the growth, development, and present functions of the

Cabinet Council. In the words of Lord Macaulay (*History of England*, iv. 437), 'No writer has yet attempted to trace the progress of this institution, an institution indispensable to the harmonious working of our other institutions.'

"My own researches in this field enabled me to accumulate a mass of information which has proved of much utility in the settlement of many points arising out of responsible government. I was frequently urged, by persons whose opinions were entitled to respect, to digest and arrange my collections in a methodical shape. The fact that the greater part of my notes had been collected when engaged in the investigation of questions not of mere local or temporary significance, but capable of general application, led me to think that, if the result were embodied in the form of a treatise on parliamentary government as administered in Great Britain, it might prove of practical value both in England and her colonies; and that in the constitutional states of continental Europe it might serve to make more clearly known the peculiar features of that form of government, which has been so often admired, but never successfully imitated. I therefore determined to avail myself of the resources of the well-stored library under my charge, and attempt the compilation of a work which, while trenching as little as possible on ground already worthily occupied by former writers, should aim at supplying information upon branches of constitutional knowledge hitherto overlooked.

"I proposed at first to prepare, more especially for colonial use, a manual which should include a dissertation upon the peculiar features of 'Responsible Government' in the colonies. But I decided, after much reflection on the subject, to change my plan, and to confine myself to the exposition of parliamentary government in England. I arrived at this conclusion, firstly, from a conviction that the safest guide to the colonies, whose institutions are professedly modelled upon those of the mother-country, will be found in a detailed account

of the system which prevails in the parent state ; and, secondly, because parliamentary government in our colonies is still in its infancy, and its success is as yet but problematical. 'The well-understood wishes of the people as expressed through their representatives' has indeed been the acknowledged maxim of colonial rule ; and, so far as they are applicable to colonial society, the principles of the British Constitution have, in the main, been faithfully carried out. But it is easy to foresee that some considerable modifications must at no distant day be introduced into the fabric of colonial government, to enable it to resist the encroachments of the tide of democratic ascendancy, which is everywhere uprising, and threatening to overwhelm 'the powers that be.' Most of the British colonies still enjoy the advantage of an immense extent of unoccupied territory, affording to industrious men of the humblest class the opportunity of becoming landowners, and of achieving a degree of comfort and independence which naturally inclines them to be supporters of law and order. Nevertheless, from an observation of the working of our municipal institutions in Canada, and of the characteristics and results of responsible government in the British dependencies generally, it is evident that the democratic element is everywhere gaining the mastery, and is seeking the overthrow of all institutions that are intended to be a check upon the popular will.

"The great and increasing defect in all parliamentary governments, whether provincial or imperial, is the weakness of executive authority. It may be difficult to concede to the governor of a colony the same amount of deference and respect which is accorded to an English sovereign. But any political system which is based upon the monarchical principle must concede to the chief ruler something more than mere ceremonial functions. It is the tendency of the age in which we live to relax the bonds of all authority, and to deprive all rank and station, not directly derived from the people, of the

influence which it has heretofore possessed. The hereditary dignity of the British crown itself has, within the last half-century, sustained considerable loss. In popular estimation in our own day the prerogatives of royalty are accounted as well nigh obsolete; and, whatever may be the degree of affection expressed towards the occupant of the throne, the sovereign of England is too often regarded as but little more than an ornamental appendage to the state, and her rightful authority either derided or ignored. These erroneous ideas, it need scarcely be said, are not shared by any who have participated in the direction of state affairs. But they are widely diffused, even amongst educated men. The true position of the sovereign in a parliamentary government may not appear to be capable of exact definition, because much will always depend upon the personal character of the reigning monarch. But in the treatment of this difficult question, I have endeavoured to reflect faithfully the views of the most experienced statesmen of the present day; and, while I have elsewhere claimed for the popular element in our constitution its legitimate weight and influence, I have here sought to vindicate for the monarchical element its appropriate sphere; being convinced that the functions of the crown are the more apt to be unappreciated because their most beneficial operations are those which, whilst strictly constitutional, are hidden from the public eye.

“In attempting to define the limits between the authority of the crown and that of the legislature under parliamentary government, I have never relied upon my own interpretations, but have always illustrated the matter in hand by reference to the best opinions recorded in the debates of Parliament, or in evidence before select committees of either House. Such testimony, for the most part from the lips of eminent statesmen and politicians of the present generation, is of the highest value, especially when it embodies information upon the usages of the constitution which had not previously appeared in print.



It is in the abundant use of such valuable material, never before incorporated in any similar treatise, that the chief claim of my work to public attention must consist."

Such was the author's own account of the causes which led to the publication of the earlier of his two volumes. But two years later, in following it up with his second volume, he admitted that—

"The publication of the earlier volume was undertaken sooner than I had originally contemplated, from a desire to place it in the hands of prominent public men in Canada before the constitution of the new Dominion should be enforced, trusting that it might be helpful in the settlement of various political questions which were likely to arise at that juncture. In order to accomplish this, I was obliged to change the plan of my work to the detriment, in some measure, of its appropriate order and sequence. The history and development of the king's councils, and the interior working of the Cabinet, ought properly to have followed my exposition of the kingly office; and such had been my first design. But, as these chapters were not sufficiently advanced to admit of their insertion in the first volume, I preferred to omit them from their proper place, rather than postpone the publication. I mention this, as it will explain what might otherwise be regarded as a defect in the work itself. Be this, however, as it may, the additional time afforded for the completion of the work has enabled me to bring down my narrative of constitutional history and practice to the present day, when we are about to enter upon a new and important era in our political history."

Thus, in preparing a revised edition of the work at the present time, I found that I was justified, by the author's own opinion, in venturing on a considerable rearrangement of the matter. Such a rearrangement had been partly effected by Dr. Todd's own son when a second edition of the work was

called for after the author's death in 1884. But I have carried out the plan, to which he thus set the seal of his authority, to a much greater extent; and, by dividing the entire work into parts, have endeavoured both to assist my readers and to indicate the general principles on which I have proceeded.

In rearranging the work it became possible, moreover, largely to reduce its size without interfering with its value. Partly from the fact that the work was originally published in two parts, and partly from his desire to make each section complete, Dr. Todd in the original edition frequently travelled over the same ground, while he added long historical accounts of the rise and fall of administrations in England, and elaborate disquisitions on the particular duties of each department in the state, which, however valuable in themselves, seemed out of place in a serious constitutional treatise. By consolidating what was thus repeated, by omitting what was thus irrelevant, and by other minor alterations, I have succeeded in reducing the work to one-half its original size, without, as I hope, detracting from its importance or interest.

But, though I have made these large excisions, I have endeavoured to leave the author's text in the shape in which he himself produced it. With the exception of small corrections, such as the author himself would have probably made in a later edition, I have altered neither his language nor his style. In some cases, when I thought his facts or his conclusions wrong, I have pointed out my reasons for so thinking in notes instead of altering the text. In the few cases, however, where the author displayed his own political opinions, I have not scrupled to strike them out, believing that, on mature reflection, Dr. Todd would himself have desired that his facts and arguments should speak for themselves. I have specially taken this course with respect to the author's predictions of the consequences of the Reform Act of 1867, because, in the first place, they do not seem to have been



verified by the result ; and, in the next place, whether right or wrong, they are apparently out of place in a grave constitutional treatise.

I cannot close my labours without expressing my admiration of the knowledge and industry which are displayed in every chapter of Dr. Todd's work, and my hope that this abbreviated edition may make his researches into the parliamentary government of Britain more accessible and more familiar to English-speaking readers in every part of the world.

S. W.

*September, 1892.*

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# PARLIAMENTARY GOVERNMENT

IN

## ENGLAND.

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### PART I.

#### *PREROGATIVE AND PARLIAMENTARY GOVERNMENT.*

#### CHAPTER I.

##### GENERAL INTRODUCTION.

THE government of England is conducted in conformity with certain traditional maxims, which limit the exercise of all political powers therein. These maxims are, for the most part, unwritten and conventional. They have never been declared in any formal charter or statute, but have developed, in the course of centuries, side by side with the written law. They embody the matured experience of successive generations of statesmen, and are known as the precepts of the constitution.<sup>1</sup>

Definition of  
parliamentary  
government.

The principle of a constitutional or parliamentary government is essentially different from that either of a republic or of a despotism. A constitutional king is not responsible to the people, but he is bound by the laws; he is not free to govern as he pleases, but must rule in conformity to the recognized usages of the constitution. In a parliamentary government, the obligation of a king to rule righteously is as

<sup>1</sup> See Freeman, *Growth of Eng. Const.* c. iii.; Bonamy Price, *Cont. Rev.* v. 38, p. 943.

great as that of a people to obey those who have the rule over them. It is indeed more difficult to control and punish

Power of the  
sovereign  
under parlia-  
mentary  
government.

a sovereign who may abuse his office than to call people to account for treason and rebellion. But in a parliamentary government the kingly power is subjected to such rigid limitations that its abuse is difficult, if not impossible. The axiom that the king can do

no wrong, is necessary for the protection of the monarchy ; but it is rendered innocuous by the affirmation of the doctrine that ministers of state are responsible for every exercise of

Relation of  
ministers to  
the crown.

kingly authority. These ministers have been permitted to share, with the crown, in the functions of royalty, on condition that they assume a full responsibility before Parliament and people. And as no minister could properly undertake to be responsible for a policy which he could not control, or for acts which he did not approve, it has necessarily followed that the direction and administration of the policy of government have passed into the hands of the constitutional advisers of the crown. By these means, the services of statemen in whom the country has confidence have been secured on behalf of the empire ; while the equilibrium of the state has been preserved, amidst the recurrent changes of its actual rulers, by the permanence of the monarchical principle in the person of the sovereign. Such are the theory and practice of the British constitution, which it will be the endeavour of the author to explain in the following pages.

The great and leading maxims of the British constitution are the personal irresponsibility of the king, the responsibility of ministers, and the inquisitorial power of Parliament. For the complete recognition of these cardinal principles, the nation is indebted to the statesmen who effected the Revolution of 1688.

Revolution of  
1688.

Prior to that epoch, the government of England was mainly carried on by the king in person, with the advice and assistance of ministers appointed by himself, and responsible to him alone. Under this system Parliament had no voice in the selection of ministers of the crown ; and, whenever adverse opinions in regard to questions of administration were entertained by either House of Parliament, there were no means of making those opinions known, except by

Government by  
prerogative.

retrospective complaint and remonstrance. This occasioned frequent contests between the crown and Parliament, which sometimes ended in civil war.

While the sole executive authority of the realm was possessed by the king—in whom, together with his ministers and officers of state, was vested the exclusive right of administering the laws of the land—the legislative authority was divided between three co-ordinate powers, the King, the House of Lords, and the House of Commons. Each of these branches of the one Parliament enjoyed co-ordinate legislative authority.

So long as this form of government prevailed, it was customary to assume that the well-being of the English commonwealth depended on the preservation of the balance of power between these branches

Balance of  
powers in the  
constitution.

of the supreme Parliament, so that any abuse of authority on the part of one, might admit of correction by the interposition of the authority of another. For example, the power of the two Houses of Parliament to frame laws was presumed to be held in check by the king's negative. Again, the arbitrary exercise of the king's veto was restrained by the power which Parliament possessed of refusing a grant of supplies for the service of the crown. On the other hand, freedom of speech, though nominally conceded to Parliament from a very early period, was not invariably respected by the crown. In some instances, the Tudor monarchs went the length of charging the Speaker of the Commons to forbid members from meddling with matters of state. Occasionally we read of free-spoken representatives being cited before the Privy Council, interrogated and reprimanded, or sent to the Tower. In self-defence, the Commons adopted a standing order for the exclusion of strangers during debate, and making it punishable to repeat out of doors what had passed within.<sup>1</sup> And, in order to maintain the due independence of the legislative chambers, it was held to be an infringement of constitutional privilege for the king to take the initiative in legislation by submitting any bills to the consideration of the two Houses—save only acts of grace and pardon—or even for the sovereign to take formal notice of any resolution or proceeding of Parliament which did not affect the interests of the crown, until the

<sup>1</sup> Macaulay, *Hist. of Eng.* v. 3, p. 543; Park's *Dogmas*, p. 104; May, *Parl. Prac.* c. iv.

same had been regularly communicated to him for his concurrence.<sup>1</sup>

This was the doctrine and usage of the English constitution which prevailed before the era of parliamentary government ; and, notwithstanding the fundamental alterations that have since taken place in constitutional practice, this is still the theory of the

Contrast  
between the  
theory and  
practice of the  
constitution.

British government, as expounded by Blackstone, Paley, De Lolme, and other text-writers of a later date. And yet how strikingly is this theory at variance with the recorded facts of our Parliamentary history for the past century and a half ! While for many generations the forms of the ancient constitution of England have continued unchanged, the principle of growth and development has been at work, and has silently effected numerous and important alterations in all our governmental institutions. For instance, the prerogative of the crown to veto obnoxious measures presented for its sanction by the Legislative Chambers has never been invoked since the reign of Queen Anne. The undoubted right of the Commons to withhold supplies from the crown has not been exercised in a single instance since the Revolution of 1688. All important public bills are now submitted to Parliament by ministers of the crown, with the avowed sanction and express authority of the sovereign ; and it has become a recognized and prominent part of the functions of the king's ministers that they shall be able to lead and control the two Houses of Parliament, and to carry on the government therein, by themselves undertaking the oversight and direction of the entire mass of public legislation. Moreover, the exercise of every branch of the royal prerogative is now subjected to free criticism in both Houses of Parliament ; and so much publicity is allowed to the debates and proceedings as to justify the saying that "the entire people are present, as it were, and assist in the deliberations of Parliament."<sup>2</sup>

This wide discrepancy between theory and practice affords unmistakable proof that the constitution has undergone material alteration within the last 150 years. Formerly the obsolete privileges above enumerated were regarded as so many proofs of an admirable system of "checks" and "balances

<sup>1</sup> *Hats. Prec.* v. 2, p. 356.

<sup>2</sup> May, *Const. Hist.* ed. 1871, v. 2, p. 53.

of power," whereby the different parts of our complex political system were maintained in equipoise. They now remain as mere indications of ancient landmarks, which have ceased to be effectual restraints in the existing development of our institutions.<sup>1</sup>

A proof of vital changes in the constitution.

The principal change effected by the development of the English constitution since the Revolution of 1688 has been the virtual transference of the centre and force of the state from the crown to the House of Commons. The transference indeed was not immediate. The Revolution of 1688 placed the control of the government of England in the hands of the great county families; and from that period until 1832 the power of the peerage was immense. This power was exercised not so much in their own Chamber as indirectly towards the sovereign, and over the county and borough elections. Their influence at court, and their authority as landed proprietors in the constituencies, generally made the Lords virtually supreme over every successive administration. Consequently, the fate of a cabinet was virtually determined by the relative strength of the rival factions into which the leading families were divided. But the Reform Bill of 1832 deprived them of the greater portion of this power, and transferred it to the middle class. The commercial and manufacturing interests, which have attained to such enormous magnitude within the present century, now possess a great and increasing share of political power.

House of Commons under parliamentary government.

Influence of county families.

The growing political importance of the House of Commons, since the establishment of parliamentary government, has materially modified the relations between the two Chambers, and lessened the authority which theoretically appertains to the House of Lords as a co-ordinate and co-equal branch of the imperial legislature. Though equally free with the Commons to express their opinion upon all acts of administration, and their approval or otherwise of the general conduct or policy of the cabinet, they are unable, by their vote, to support or overthrow a ministry against the will of the Lower House. It

Modified relations between both Chambers.

<sup>1</sup> As to general futility of "checks and balances" in government, see paper, by T. M. Cooley, the learned American jurist, in the *Int. Rev.* v. 3, p. 317.



is true that the Grey ministry resigned, in 1832, in consequence of the rejection of the Reform Bill by the House of Lords; but this was an instance of parliamentary obstruction to a measure of vital importance, which the administration had pledged themselves to carry through the legislature. After an ineffectual attempt to form a new ministry, the former cabinet was reinstated in office, and succeeded in obtaining the consent of the Lords to their measure of reform.

In the fulfilment of their legislative functions, the Lords, from the commencement of the present century, have been becoming less and less a House for the initiation of great public measures. Bills which concern the improvement of the law, and certain private Bills of a semi-judicial character, appropriately commence with the Lords; and in 1859 an arrangement was made whereby a fair proportion of ordinary private Bills should be first introduced in the Upper House, with a view to facilitate the despatch of private business.<sup>1</sup> But, as a general rule, the Commons are not disposed to receive very favourably Bills which do not originate with themselves; and every Ministry has felt the advantage of having the support of the House of Commons in bringing a measure before the House of Lords.<sup>2</sup> The province of the Lords appears more properly to be that of controlling, revising, and amending the projects of legislation which emanate from the House of Commons.<sup>3</sup> "To balance and regulate the political movement of the nation; . . . to test, by temporary resistance, the sincerity and strength of the will which demands a change; to make legislation take its stand on the good sense and ultimate judgment instead of the momentary desire of the country; and to give continuity and stability to the general policy of the nation."<sup>4</sup> It may be regarded, however, as a settled principle of modern parliamentary government, that it is not the duty of the House of Lords to continue a persistent opposition to measures that have been repeatedly passed by the House of

<sup>1</sup> May, *Parl. Prac.* ed. 1883, p. 759; *Com. Jour.* Feb. 7, 1859.

<sup>2</sup> Duke of Argyll, *Hans. D.* v. 198, p. 1475.

<sup>3</sup> See Lords' Debates in *Hans.* v. 119, pp. 246, 317; *Ib.* v. 98, p. 335; v. 159, p. 2130; v. 161, p. 182; v. 203, p. 234; and see Bagehot, *Eng. Const.* pp. 130, 135.

<sup>4</sup> Bonamy Price, *Cont. Rev.* v. 38, p. 947.

Commons.<sup>1</sup> Such a course would inevitably lead to an infringement of the constitutional independence of the Upper House, by the creation of additional Peers to facilitate the passing of the particular measure. But this is an extreme proceeding, which could not be approved in all circumstances; although the right of the crown in the exercise of this prerogative can only be restrained by considerations of public policy.<sup>2</sup>

Should not give persistent opposition to the Commons.

A serious defect has been noted in the conduct of the great majority of the hereditary Peers of England, and one which has impaired, if not endangered, their political influence, namely, their indifference to the discharge of their parliamentary duties. The House of Lords consists of about four hundred and fifty Peers available for legislative service; of these not above two hundred take any part therein. The quorum of the House is but three,<sup>3</sup> a number palpably inadequate for a numerous deliberative assembly, and the average attendance of Peers contrasts unfavourably with that of the other Chamber.<sup>4</sup> But with a large proportion of members who are fitted by natural gifts, high cultivation, and political experience acquired in other fields of labour for a parliamentary career, the House of Lords, if sufficiently alive to their responsibilities, may possess and permanently retain the confidence of the nation, as an essential part of the legislature, and a main safeguard of constitutional liberty.<sup>5</sup>

Culpable indifference of the Peers to their legislative duties.

Reasons why the Lords should retain confidence of the nation.

<sup>1</sup> See the Duke of Wellington's letter on his management of the House of Lords, from 1830 to 1846, in Brialmont's *Life*, v. 4, p. 140; Lord Stanley on Free Trade, *Hans. D.* v. 86, p. 1175; Lords Grey and Lyndhurst on the Jewish Oaths Bill, *ib.* v. 149, pp. 1481, 1771; and see Mr. Horsman's speech, *ib.* v. 159, p. 1573; Lord Granville, *ib.* v. 196, p. 1656.

<sup>2</sup> On this subject, see May, *Const. Hist.* v. 1, p. 262; and Hearn's remarks, in his *Govt. of Eng.* pp. 168-175.

<sup>3</sup> *Hans. D.* v. 74, p. 1016.

<sup>4</sup> See May, *Const. Hist.* v. 1, p. 266; *Hans. D.* v. 180, p. 1034; Lord Houghton, in *Fort. Rev.* Jan. 1872. With the House of Commons within the past few years, there is an increasing disposition to attend more regularly than formerly; which is attributable, in a great degree, to the higher standard of duty which is enforced by the constituent body. Rep. Com<sup>e</sup>. on H. of Com. arrangements, 1867, *Evid.* 264; *Hans. D.* v. 195, pp. 259, 457; but see *ib.* p. 303.

<sup>5</sup> See *Hans. D.* v. 188, p. 129. In fact, during the late Parliament (1874-79) the hereditary Chamber has certainly not diminished in importance, or

Ever since the days of Walpole, however, the House of Commons have been steadily gaining political ascendancy. Nominally co-equal with the crown and the Lords, as a constituent part of the legislature, they have gradually attained to a position which enables them to compel the adoption, sooner or later, of any policy, or any legislative measure, upon which they are agreed. Witness the Roman Catholic Emancipation Act, which was carried against the deliberate will of George IV.; and the Reform Act, the Repeal of the Corn Laws, and the Jewish Oaths Bill, which were carried against the deliberate will of the House of Lords. These, and other important acts of legislation, though disapproved either by the crown or by the Peers, were nevertheless acquiesced in by them, to avert more serious consequences. Again, it devolves on the House of Commons practically to determine in whose hands the government of the country shall be placed. By giving their confidence to one party and by refusing it to another, by extending it to certain men and refusing it to certain other men, they plainly intimate to the sovereign the statesmen who should be selected to conduct the administration of public affairs, and to advise the crown in the exercise of its high prerogatives.<sup>1</sup>

In deciding the fate of a ministry, the House of Lords are practically powerless; "only for fifteen years out of the last fifty has the ministry of the day possessed the confidence of the House of Lords."<sup>2</sup> The Grey Ministry (in 1830-34), which was remarkably strong both at home and abroad, was throughout opposed in the Lords by a decided and constantly increasing majority. On the other hand, the Derby administrations, in 1852 and 1858, though approved and sustained in the Upper House, were speedily broken up because they could not command a majority in the Commons. And the Palmerston ministry in 1864, when their foreign policy was censured by the House of Lords, were able to set at nought this hostile vote, in consequence of obtaining a small majority, upon a similar question,

in popular estimation; and an unusually large number of public measures have originated therein. See *Fras. Mag.* v. 15, N.S. p. 173.

<sup>1</sup> Russell, *Eng. Const.* p. xlviii.

<sup>2</sup> Mr. Gladstone's *Gleanings of Past Years*, v. 1, p. 236.

in the Lower House.<sup>1</sup> These examples are sufficient to prove the great and preponderating authority of the House of Commons.

These preliminary observations upon the system of parliamentary government in England will, it is hoped, afford some idea of its true character, and serve to explain the chief points of contrast between our present political institutions and those which were in operation prior to the Revolution of 1688.

It must be evident to the student of history, that parliamentary government is no modern political device Parliamentary government. to substitute the supremacy of Parliament for that of the crown; that it owes its origin to the growth of fundamental principles in the English constitution; and that the transition, from the ancient method of government by prerogative to that which now prevails, has been a gradual and legitimate development. Whether the modern system is, in every respect, the most perfect or the best adapted to the wants and wishes of the nation, it is not the object of the present writer to inquire. He is not concerned with the special advocacy of any particular form of government; his aim has been simply to describe the actual working of representative institutions in England as they now exist. He has not refrained from noticing, as opportunity offered, the peculiar defects of parliamentary government, and the dangers to which he conceives that system to be exposed. On the other hand, he is bound in fairness to point out its peculiar merits and advantages, which have contributed to make it popular at home, and a model for imitation in many foreign countries.

<sup>1</sup> See Mr. Lowe's speech, *Hans. D.* v. 244, p. 208.

## CHAPTER II.

## THE COUNCILS OF THE CROWN, UNDER PREROGATIVE GOVERNMENT.

THE origin of the political institutions of modern England must be sought for in the governmental system of our Anglo-Saxon progenitors. Meagre and imperfect as is our information on this subject, enough is known of the leading principles of the Anglo-Saxon government to show that in them were to be found the rudiments of the institutions which we now enjoy.

The precise features of the polity of England before the Norman conquest, although they have given rise to much learned inquiry, are still, to a considerable extent, conjectural. But the researches of Sir Francis Palgrave<sup>1</sup> and of Mr. Kemble,<sup>2</sup> supplemented and corrected by the more recent investigations of Mr. E. A. Freeman<sup>3</sup> and Professor Stubbs,<sup>4</sup> have been of inestimable service in elucidating much that was previously obscure in this branch of historical inquiry. The student of political history will find in their works ample materials to aid him in forming an intelligent idea of the fundamental laws and established institutions of this country in the earliest days of our national life. And these writers are all agreed in testifying that, however striking may be the contrast, in many points of detail, between the primitive form of government in the time of our Anglo-Saxon forefathers and that which now prevails, "the germs alike of the monarchic, the aristocratic, and the demo-

<sup>1</sup> *Rise and Progress of the Eng. Commonwealth*, 2 vols. 4to. 1832.

<sup>2</sup> *The Saxons in England: a History of the Eng. Commonwealth till the period of the Norm. Conq.* 2 vols. 8vo. 1849.

<sup>3</sup> *History of the Norm. Conq.* v. 1; *Preliminary History to the Election of Edward the Confessor* (1867).

<sup>4</sup> *Const. Hist. of Eng.* (1874).

cratic branches of our constitution will be found as far back as history or tradition throws any light on the institutions of our race."<sup>1</sup>

In common with other tribes of similar Teutonic origin, the Saxons in England, from a very early period, were ruled over by kings, whose power was not arbitrary and despotic, but was subjected to certain well-defined limitations by the supreme controlling authority of the law.

The dignity, authority, and power of the chief ruler in England were gradually developed from that of an ealdorman (who combined in his own person <sup>The king.</sup> the functions of a civil ruler and of a military chieftain) into that of a king—a change that is not peculiar to our own land, but which marked the progress of political society elsewhere, in countries inhabited by the Teutons and other kindred peoples. The transition from ealdorman to king brought with it an accession of power to the ruler. As the territory over which his headship was recognized expanded, his royal dignity and importance increased.<sup>2</sup>

The early Teutonic constitution, when transplanted into English soil, was, like that of many of the small states of the Old World, essentially free. It consisted of a supreme leader, with or without royal title, an aristocratic council composed of men of noble birth, and a general assembly of freemen, in whom the ultimate sovereignty resided.<sup>3</sup> By degrees, however, the primitive democracy of the ancient Teutonic communities gave place to the rising influence of the *comitatus*, <sup>The nobles.</sup> or personal following of the chiefs. And in proportion as the kings of England advanced in strength and dominion, they naturally acquired a more complete supremacy over their *comitatus*. The thanes, or body-servants of the king, were gradually invested with rank and power in the kingdom. Thus there arose a new kind of nobility, *virtute officii*, which at length obtained precedence over the older hereditary nobles.<sup>4</sup>

But the power of the crown was, from the first, subjected to the control of the Witenagemot, or "Meeting of <sup>The</sup> the Wise Men," which appears to have formed part <sup>Witenagemot.</sup> of the national polity of the Teutons, from their earliest

<sup>1</sup> Freeman, v. I, p. 75.

<sup>2</sup> *Ib.* pp. 76-81; Stubbs, c. vii.

<sup>3</sup> Freeman, v. I, pp. 86-90.

<sup>4</sup> *Ib.* pp. 91-97.



appearance in history, and was introduced by them into the Saxon commonwealth.<sup>1</sup> Originally a democratic assembly, Freeman describes the process by which this popular council gradually assumed an aristocratic aspect.<sup>2</sup> Under the Heptarchy, every separate king in England had his own Witenagemot; but, after the other kingdoms were merged in that of Wessex, their respective Witans became entitled to seats in the Gémot of Wessex, as being the common Gémot of the realm.

Our knowledge of the constitution of these great councils, in any English kingdom, is extremely vague and scanty. But we have proof that the great officers of the court and of the kingdom were invariably present in the Witenagemot, together with ealdormen, bishops, abbots, and many other of the king's thanes. There was also an infusion of the popular element, by the attendance of certain classes of freemen, though to what extent and in what manner this took place cannot be positively determined.<sup>3</sup>

The powers of the Witenagemot have been defined, by Kemble, as follows: "1. They possessed a consultative voice, and right to consider every public act which could be authorized by the king. 2. They deliberated upon the making of new laws which were to be added to the existing folcright, and which were then promulgated by their own and the king's authority. 3. They had the power of making alliances and treaties of peace, and of settling their terms. 4. They had the power (subject to the restriction hereinafter mentioned) of electing their king. 5. They had the power to depose the king, if his government was not conducted for the benefit of the people. 6. They had the power, conjointly with the king, of appointing prelates to vacant sees. 7. They had power to regulate ecclesiastical matters, appoint fasts and festivals, and decide upon the levy and expenditure of ecclesiastical revenue. 8. The king and his Witan had power to levy taxes for the public service. 9. The king and his Witan had power to raise land and sea forces, when occasion demanded. 10. The Witan had power to recommend, assent to, and guarantee grants of land, and to permit the conversion of folcland into

<sup>1</sup> Kemble, v. 2, pp. 185-195.

<sup>2</sup> Freeman, v. 1, pp. 106-110; and see his Paper on "The Origin of Parl. Representation," in *Int. Rev.* v. 3, p. 728.

<sup>3</sup> Kemble, v. 2, p. 237; Stubbs, c. vi.

bócland, and *vice versa*. 11. They had power to adjudge the lands of offenders and intestates to be forfeit to the king. 12. Lastly, the Witan acted as a supreme court of justice, both in civil and criminal causes."<sup>1</sup> All these instances of the powers exercised by the Witenagemot are illustrated, in Mr. Kemble's narrative, by numerous examples, taken from the records and chronicles of the period.

In asserting that the king was elected by the Witan, and was subject to be deposed by their authority, it must not be inferred that the Anglo-Saxon state was, either in spirit or in form, an elective monarchy, in the modern acceptance of the term. In every Teutonic kingdom there was a royal family, out of which kings were chosen; but within that royal family the Witan of the land were privileged to exercise choice. The eldest son of the last king was considered as having a preferential right; but if he were too young, or were otherwise objectionable, some other and more capable member of the royal family would be chosen instead. Again, the recommendation of the king himself as to his successor on the throne had great weight, and was usually respected. On every occasion, indeed, the right to the kingly office must be substantiated and confirmed by a competent tribunal. But in so doing the members of the great council "are not national representatives, offering the empire to a candidate whom their voices have raised to authority; but they are 'Witan,' the judges, whose wisdom is to satisfy the people that their allegiance is demanded by their lawful sovereign." "Though we cannot adopt the theory that the Anglo-Saxon empire was elective, we arrive at the conclusion that it was governed by law. The Constitution required that the right of the sovereign should be sanctioned by a competent tribunal." Thus, "the inchoate title of the sovereign was confirmed by the national assent, and his claim was to be recognized by the legislature. In this sense," says Sir Francis Palgrave, "the king was said to be elected by the people."<sup>2</sup>

In like manner, the extreme right of deposing their sovereign, which the law assigned to the Witan, was one that was obviously to be resorted to only in cases of emergency, when the conduct of the reigning monarch had made him intolerable

<sup>1</sup> Kemble, v. 2, pp. 204-232.

<sup>2</sup> *Eng. Commonwealth*, v. 1, pp. 558-562; Kemble, v. 2, p. 214; Freeman, v. 1, p. 117.



to the people. The exercise of this power by the Witan was an event of very rare occurrence, but examples are to be found, both before and after the Norman conquest, of the deposition of kings by the action of Parliament.<sup>1</sup>

From this it will be seen that the powers of the Witenagemot exceeded those assigned by law to modern legislative bodies, or exercised, in conformity with constitutional practice, by the House of Commons at the present day.<sup>2</sup> "Every act of government of any importance was done, not by the king alone, but by the king and his Witan." The Witan had a right to share, not merely in ordinary acts of legislation, but even in matters of prerogative and administration which are now considered as exclusively appertaining to the crown.<sup>3</sup> It might reasonably be anticipated that such a polity would unavoidably give rise to frequent collisions between the king and his parliament, and such undoubtedly was the case after the Norman conquest, when the power of the sovereign had assumed more formidable dimensions, at variance with the ancient principles of English liberty.<sup>4</sup> But the Saxon Witenagemot appears to have co-operated more harmoniously with the king than similar assemblies of a later date. This may be accounted for by the fact that "it was not a body external to the king, but a body of which the king was the head in a much more direct sense than he could be said to be the head of a later mediæval Parliament. The king and his Witan acted together; the king could do nothing without the Witan, and the Witan could do nothing without the king; they were no external half-hostile body, but his own council surrounding and advising him."<sup>5</sup> In such circumstances, it was natural that this influential body should have been privileged to interpose, with authority, in the conduct of public affairs.

Royal authority. The mutual interdependence between the sovereign and his council at this period of our

<sup>1</sup> Kemble, v. 2, p. 219; Stubbs, v. 1, p. 136.

<sup>2</sup> [I have retained the statement in the text; but the powers, exercised by the Witan in electing and deposing kings, cannot be said to have exceeded the power exercised by the two Houses of Parliament in 1688-89. —*Editor.*]

<sup>3</sup> Freeman, v. 1, pp. 113, 120.

<sup>4</sup> *Ib.* p. 121.

<sup>5</sup> *Ib.* p. 122.

history must not lead us to infer that a Saxon monarch was a mere instrument for carrying out the resolves of his councillors.

The king of England, in those days, was the acknowledged head of his people—the lord to whom all the nobles of the land owed fealty and service. He was the fountain of honour, and the dispenser of the national wealth. He appointed the time and place for meetings of the Witan, and laid before them whatever matters required their advice or consent, exercising over their deliberations the influence which properly belonged to his exalted station and personal character. If weak, vacillating, or unworthy, his powers would necessarily be impaired, and it would be the province of the Witan to restrain him from acts of misgovernment, and to demand security for the due administration of the royal functions. Strictly limited by law in the exercise of his prerogatives, the personal authority of an ancient English sovereign, if at all worthy of his position, was well-nigh unbounded.<sup>1</sup>

After the triumph of the Norman arms in 1066, at the battle of Hastings, the crown of England was transferred to William the Conqueror by a forced election of the English Witan.<sup>2</sup> William I. claimed to be

<sup>1</sup> Freeman, v. 1, pp. 123–126, 163; Kemble, v. 2, p. 232; Palgrave, v. 1, p. 657; Stubbs, v. 1, p. 141.

<sup>2</sup> Stubbs, v. 1, p. 257; Freeman, v. 1, p. 163. The form of an election continued to be observed, as a general rule, until the accession of Edward I., when the principle prevailed, that, immediately on the death of the king, the right of the crown is vested in his heir, who commences his reign from that moment (*Ib.* p. 340; Allen, *Royal Prerog.* pp. 44–47). Nevertheless, in the ceremonial observed at the coronation of the successive kings of England to that of Henry VIII. inclusive, there continued to be used forms wherein the recognition, will, and consent of the people are distinctly asked, and the kings were declared to be “elect and chosen” by “the three estates of the realm” (*Chapters on Coronation*, Lon. 1838, pp. 99, 103). But in the reign of Henry VIII., Parliament definitely determined the succession of the crown to be in Edward, Mary, and Elizabeth; and, in default of issue from them, even empowered the king to bequeath the crown to whomsoever he would, provided only that his choice should be made known, “as well to the lords spiritual and temporal, as to all other his loving and obedient subjects, to the intent that their assent and consent might appear to concur therein” (25 Hen. VIII. c. 22; 28 Hen. VIII. c. 7; 35 Hen. VIII. c. 1). Afterwards, Queen Elizabeth’s title to the crown was formally recognized by Parliament (1 Eliz. c. 3). And upon her decease, without issue, Parliament acknowledged that the English crown “did, by inherited birthright and lawful and undoubted succession,” descend to James I., as “the next and sole

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<sup>3</sup> *Ib.* p. 122.

the lawful successor of the Saxon kings. Inheriting their rights, he professed to govern according to their laws.<sup>1</sup> But with the new dynasty there came in a new nobility, who gradually displaced the nobles of the land in offices of rule, and obtained possession of their estates. Thus the power of the crown steadily increased, and the authority of the national councils was proportionably impaired. "The idea of a nation and its chief, of a king and his councillors, almost died away; the king became half despot, half mere feudal lord. England was never without national assemblies of some kind or other; but, from the Conquest in the eleventh century till the second burst of freedom in the thirteenth, they do not stand out in the same distinct and palpable shape in which they do both in earlier and later times."<sup>2</sup> Nevertheless, the liberties of their Saxon forefathers were always fresh in the recollection of successive generations of Englishmen, until, by slow degrees and after many struggles, they succeeded in recovering them—not indeed in their original shape, but in a form better adapted for the altered condition of the commonwealth.

The special characteristic of the Norman period was the growth of the new administrative system, deriving Norman polity. its origin and strength from the royal power. The foundation of this system was accomplished in the reigns of William the Conqueror and his three successors—William II., Henry I., and Stephen.<sup>3</sup> During this epoch the kings of England were practically absolute. The Witenagemot still subsisted, under the title of the Great Council of the realm, but it rather resembled an assembly of courtiers, occasionally convened for state purposes, than an organized deliberative body, subordinate only in privilege and importance to the private and "continual" council of the king.<sup>4</sup>

From the first introduction of royalty into Britain, the sovereign has always been surrounded by a select band of confidential counsellors, appointed by himself, to advise and

heir of the blood-royal of this realm" (2 James I. c. 1). Upon the abdication of James II., Parliament conferred the crown upon William and Mary, and afterwards regulated the succession in the Protestant line of the descendants of James I. (1 W. & M. sess 2, c. 2; 12 & 13 Will. III. c. 2. And see Freeman's *Growth of Eng. Const.* c. iii.).

<sup>1</sup> Freeman, v. 1, pp. 2, 4, 163.

<sup>2</sup> *Ib.* p. 122; and Stubbs, c. ix.

<sup>3</sup> Stubbs, c. xi.

<sup>4</sup> *Ib.* v. 1, p. 356

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assist him in the government of the realm.<sup>1</sup> It may be confidently asserted that there is no period of our history when the sovereign could, according to the law and constitution, act without a <sup>Advisers of the Crown.</sup> 'vice in the public concerns of the kingdom.<sup>2</sup> "That the institution of the Crown of England has always had a Privy Council inseparable from it, is a fact which ought never to be lost sight of. This council has always been bound to advise the crown in every branch and act of its executive conduct."<sup>3</sup> And it is, in fact, the only council, combining in itself both deliberative and administrative functions, which is authoritatively recognized by the law and constitution of England. The number of members composing this council has varied at different periods, according to the king's will, "but of ancient time there were twelve, or thereabouts."<sup>4</sup>

At the era of the Norman conquest there appear to have been three separate councils in existence: one, <sup>A.D. 1066.</sup> composed of nobles, who were assembled on <sup>The king's</sup> special occasions by special writs, and who, <sup>councils.</sup> together with the great officers and ministers of state, formed the *magnum concilium*; another, styled the *commune concilium*, or general parliament of the realm; a third, known as the *concilium privatum assiduum ordinarium*, or, more frequently, the king's council. It comprised certain select persons of the nobility and great officers of state, specially summoned thereunto by the king's command, and sworn, and "with whom the king usually adviseth in matters of state and government." This council—or probably a committee of it, consisting of the judges, presided over by the king, or (in his absence) the chief justiciary—served also as the supreme court of justice, which, under the denomination of the *curia regis*, commonly assembled three times in every year, wherever the king held <sup>Ordinary</sup> his court.<sup>5</sup> The king's "ordinary" or "continual" <sup>council.</sup> council was equivalent to that which was known in later

<sup>1</sup> Palgrave, v. 1, p. 325; v. 2, p. 348; Stubbs, v. 1, pp. 149, 343.

<sup>2</sup> Palgrave on the King's Council, p. 20; Kemble, v. 2, p. 188; Hearn, *Gov. of Eng.* p. 18; Courtenay, *Life of Sir Wm. Temple*, v. 2, p. 57.

<sup>3</sup> Smith, *Parl. Remem.* (1862), p. 3.

<sup>4</sup> Coke, *Fourth Inst.* p. 53.

<sup>5</sup> Hale, *Jurisdiction of the House of Lords*, pp. 5-9; *First Lords' Report*, pp. 20-23; *Lords' Pap.* 1829, v. 10; Stubbs, v. 1, p. 564.

times as the Privy Council; although, meanwhile, it differed widely in its organization. But, apart from the fact that one was temporary and occasional, and the others permanent, there seems at first to have been but little difference between this body and the other principal councils. Leading nobles were members of the "continual" council, and at meetings of the great council they naturally occupied a prominent place, either as members or assistants of that august assembly.<sup>1</sup>

The permanent council under the early Norman kings consisted of the great officers of state—namely, the chancellor, the great justiciary, the lord treasurer, the lord steward, the chamberlain, the earl marshal, the constable,—and any other persons whom the king chose to appoint. It also included the archbishops of Canterbury and of York, who claimed the right to form part of every royal council, whether public or private. It was known as the *curia regis*, otherwise styled the *aula regia*, or court of the king, and its powers were immense and undefinable. Its duty was to assist the king in the exercise of his prerogatives, and to give its sanction to acts done by him in virtue of those prerogatives—the members thereby making themselves responsible for the acts of the king.<sup>2</sup> Thus, it was the executive. It acted also as a court of law. It took part in acts of legislation. In fact, "the king, who was at once the ruler and judge of the whole nation, exercised the powers which he possessed, either directly (and this he did to a greater extent than modern students are apt to suppose) or indirectly,

<sup>1</sup> [I have retained this passage as Mr. Todd wrote it: but I apprehend that Sir W. Anson's account of these councils is more accurate and more logical. He tells us that there were four councils—the *Commune Concilium*, the *Magnum Concilium*, the *Concilium Ordinarium*, and the *Concilium Privatum*; and, he adds, "it might be possible to give a modern name to each of them, and to say that the *Commune Concilium* is Parliament; the *Magnum Concilium*, the House of Lords with the judges and law officers of the Crown; the *Concilium Ordinarium*, the Privy Council; and the *Concilium Privatum*, the Cabinet." Sir W. Anson does not, of course, mean that the old councils represented, either in their constitution or their duties, the modern bodies to which he compares them. But the comparison, nevertheless, gives the student a good idea of the relative functions of these various bodies, and enables him to understand how some of the same men were found serving on each of them (*Law and Custom of the Constitution*, Part II., "The Crown," pp. 83, 84).—Editor.]

<sup>2</sup> *First Lords' Report, Lords' Pap.* 1829, v. 10, p. 21; Stubbs, v. 1, pp. 387, 436.

through the instrumentality of his great officers." For, in considering "the interchange of advice between the king and his nobles" during this period, we must divest ourselves of modern notions of constitutional authority, and understand that, "according to the ideas prevailing in the eleventh century, it was rather the king's privilege than his duty to receive counsel from the great men of his kingdom. Their recommendations were not, like the advice of modern parliaments or ministers, commands veiled under a polite name, but in the strictest sense counsel."<sup>1</sup> Nevertheless, there were certain things which the king was never able to accomplish by his mere prerogative. Thus, he could neither legislate, nor impose new taxes,<sup>2</sup> without the consent of his Parliament. And he was bound to rule in accordance with the laws of the realm; and, if he broke those laws, his agents or advisers were, from a very early period, in some shape or other, held accountable for his misdeeds to the national assembly.<sup>3</sup> Moreover, it was the right and duty of the king to demand and receive advice from his great council in all circumstances of difficulty; for the king of England was never an absolute monarch, but was himself subject to the law. Bracton, writing in the thirteenth century, says that it is "the law by <sup>A.D. 1250.</sup> which he is made king, . . . so that if he were without a bridle, that is, the law, his great court ought to put a bridle upon him."<sup>4</sup> For, though the king is our sovereign lord, he does not possess the sovereign authority of the commonwealth, which is vested, not in the king singly, but in the king, lords, and commons jointly.<sup>5</sup> To enable him to govern his people with wisdom and discretion, the king would summon to his councils "the most considerable persons in England, the

<sup>1</sup> *The Privy Council*: the Arnold Prize Essay, 1860. By A. V. Dicey, B.A., pp. 3-6. This able essay presents, in a popular form, the results of the researches of Sir Harris Nicolas, in his learned prefaces to the *Proceedings and Ordinances of the Privy Council of England*, from 10 Rich. II. (1386) to 33 Henry VIII. (1542).

<sup>2</sup> [This, of course, is not true of the earlier Norman kings, and is hardly consistent with the practice of the Tudors and the pretensions of the Stuarts.—*Editor*.]

<sup>3</sup> Macaulay, *Hist. of Eng.* v. 1, pp. 29-32.

<sup>4</sup> Quoted by Forster, *Debates on Grand Remonstrance*, p. 28.

<sup>5</sup> Allen, *Royal Prerogative*, p. 159; *First Lords' Report*, *Lords' Pap.* 1829, v. 10, p. 22.



persons he most wanted to advise him, and the persons whose tempers he was most anxious to ascertain."<sup>1</sup>

In process of time the character of the *aula regia* underwent considerable modification. Each individual officer of the court had his own particular duties assigned to him. All business brought before the court would naturally be referred by the king to the functionary specially charged with the same. Thus, the marshal or constable, assisted probably by other members of the court, attended to military matters; the chamberlain to financial concerns; the chancellor to questions affecting the royal grants. Hence arose, by degrees, the separate institution of *curia regis*, under Henry II.—as an offshoot from the larger body—into a distinct judicial tribunal, which is the original of the present Court of Queen's Bench,<sup>1</sup> and the subsequent development, at a later period, of other courts of law and equity.

The first establishment of the law-courts, as distinct tribunals, took place, however, in the reign of King John. A.D. 1199. But it is worthy of notice that, notwithstanding the Law-courts, formation of separate courts for the administration of justice, the king's council continued to exercise judicial authority. To be the source and dispenser of justice, and to supply the defects and moderate the judgments of inferior courts, is an ancient prerogative of the crown.<sup>2</sup> This prerogative was ordinarily exercised through judges, in accordance with established precedent; but it was still regarded as within the power of the king to try suits, either by his own authority, or through the officers of his council.<sup>3</sup>

With the accession of Edward I. still more important changes commenced. The contemporaries of the Conqueror and his immediate descendants had been accustomed to the exercise of justice by the king and his great officers, after a rude and informal fashion. Meanwhile, the ordinary councils of King John and of Henry III. were largely influenced by the growing power of the barons, which operated as a restraint upon the arbitrary power of the

<sup>1</sup> Bagehot, *Eng. Const.* p. 304.

<sup>2</sup> *Chron. of Reigns of Hen. II. and Richard I.*, edited by Stubbs, v. 2, pp. 71-80; and see Stubbs, *Const. Hist.* v. 1, p. 465.

<sup>3</sup> See Palgrave, *Eng. Commonwealth*, v. 1, p. 283.

<sup>4</sup> Dicey, p. 8.

sovereign. But, when Edward I. ascended the throne, a better understanding began to prevail between the monarch and his advisers.<sup>1</sup> The rise of the law courts out of the *curia regis* begat, in the people generally, a desire for more orderly government. Those who contrasted the regular administration of justice with the irresponsible and uncertain procedure before the king's council, longed for something more in accordance with their ancient Saxon liberties.<sup>2</sup> For the functions of the ordinary council at this time seem to have been co-extensive with the functions of the crown. Its consent appears to have been deemed necessary to every Ordinary council. important act of the king in the exercise of his legislative as well as of his executive powers. It "was evidently then considered as a very important part of the government, responsible to the king and the country for the acts done under its sanction; and the people often took great interest in its proper formation, of which there are striking instances in the reigns of Henry III. and Edward II."<sup>3</sup>

Contemporaneously with these events, the "great council" was steadily undergoing transformation, and assuming definite shape as a legislative body, with Great council. acknowledged rights and privileges. Formerly, as we have seen, the great council did not differ very materially from the smaller and more confidential assembly. The functions of both were chiefly administrative. The councils of William I. and his immediate successors, so far as existing records show, were principally occupied with matters of executive government—such as the grant of local charters, and the settlement of titles to land.<sup>4</sup> The king could do nearly everything in his "ordinary council" that was lawful for the great council to effect, except impose taxes. William the Conqueror, in ascending the throne of England, had expressly renounced all right to tax the nation without the consent of the *commune concilium regni*; and had promised to govern by the old laws, except as they might be altered expressly for the general good.<sup>5</sup> It is true that he had not been faithful to his word. The

<sup>1</sup> Palgrave, *King's Council*, p. 19; Stubbs, c. xv.

<sup>2</sup> Dicey, p. 11.

<sup>3</sup> *First Lords' Report, Lords' Pap.* 1829, v. 10, p. 451; Hearn, *Govt. of Eng.* p. 273.

<sup>4</sup> Cox, *Ant. Parly. Elecs.* p. 61.

<sup>5</sup> Taylor, *Book of Rights*, p. 9.



larger council was very rarely convened.<sup>1</sup> But every formal concession on the part of the crown contributed somewhat to the growth and establishment of the great national council upon a firmer basis. And the continual and ever-increasing necessities of the state compelled the Norman sovereigns to yield, however reluctantly, new charters, with extended privileges, to their powerful but insubordinate nobility. Thus the lawless barons won for a down-trodden and spiritless people precious franchises, that in due time should elevate the national character, and "so balance the forces existing in the state as to give to each its opportunity of legitimate development."<sup>2</sup>

The sagacious policy of Henry II., during his long and eventful reign, did much to prepare the way for these changes in the framework of English government. Though bent upon consolidating the kingly power, Henry II., when not absent from the realm, took frequent occasion to convene the old national assembly, and to ask the counsel of his constitutional advisers upon every possible subject. In fact, many matters were freely discussed at these councils which would be deemed unsuitable for the consideration of Parliament at the present day. But the advice sought for and received, in conformity with ancient usage, did not debar the sovereign from the right to act as his own judgment might dictate upon the particular question.<sup>3</sup>

From the grant of Magna Carta by King John, confirmed and supplemented by similar concessions obtained from later monarchs, may be dated the rise of our representative system,<sup>4</sup> the recognition of the House of Commons as a separate estate of the realm, and the establishment upon a sure foundation of our national liberties.

The precise period when the representative system of England originated, and the circumstances that gave it birth, are points which, notwithstanding the laborious investigations of constitutional writers, are still involved in great obscurity. The learned authors of

<sup>1</sup> Stubbs, v. 1, pp. 358, 369.

<sup>2</sup> Professor Stubbs's learned and admirable Preface to the *Chronicle of Benedict of Peterborough* (*Rolls Chronicles*, published in 1867), v. 2, p. xxxvii.

<sup>3</sup> Stubbs, *Const. Hist.* v. 1, p. 570.

<sup>4</sup> *Ib.* v. 1, pp. 530-543, 622.

the report of the Lords' Committee, however, arrived at the following conclusions upon this subject. They are of opinion that, from the Conquest until the reign of John, prelates, earls, and barons (who constituted the three estates of the realm)<sup>1</sup> generally formed, under the king, the legislative power, for all purposes except the imposition of taxes; although the advice of an inferior class in the community, or of particular individuals not of the privileged orders, would be occasionally asked by the king, in exceptional circumstances, as for the purpose of giving validity to the grant of an extraordinary aid to the crown. But it cannot be shown that, at this time, any commoners, elected by the people, or otherwise, were called to the great councils, or Parliaments, as members thereof.<sup>2</sup> The great council of the realm convened by John, at St. Albans in 1213, included certain persons who were summoned thereto by virtue of their holding lands in chief of the crown. Some of these individuals gave their personal attendance, others possibly appeared by representation, inasmuch as the lesser barons, being under no peculiar obligation of personal attendance, would naturally incline to select certain of their richest and most influential brethren to represent them.<sup>3</sup> But, during the reign of Henry III., important changes took place in the constitution of the great council; and, in 1265, through the instrumentality of Simon de Montfort, Earl of Leicester, a great council was convened, which consisted not only of persons who were summoned personally, by special writ, according to the charter of John, but of persons who were required to attend, not merely by general summons, according to the same charter, but in consequence of writs directed to the sheriffs of certain counties, and to certain cities and boroughs, commanding the recipients to cause "knights, citizens, and burgesses" to be chosen as representatives of such counties, cities, and boroughs respectively, who should attend the king's council, together with those who had been personally summoned thereto.<sup>4</sup> The

<sup>1</sup> Stubbs, *Const. Hist.* v. 2, pp. 168-204; and see Freeman in *Int. Rev.* v. 3, p. 737; *Church Quar. Rev.* v. 4, p. 438.

<sup>2</sup> See *Parry's Parli.* Introd. pp. xii.-xvii.; Cox, *Ant. Parly. Elecs.* pp. 64-70; Stubbs, v. 1, p. 368.

<sup>3</sup> See Stubbs, v. 1, pp. 527, 564.

<sup>4</sup> See *ib.* v. 2, pp. 92, 221; *Simon de Montfort, the Creator of the H. of Commons*, by R. Pauli: translated (and revised by the author) by U.

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first clear evidence remaining of any subsequent convention of a legislative assembly, in similar circumstances, was the summoning of "a great and model Parliament" in the twenty-third year of Edward I.,<sup>1</sup> the constitution of the intervening assemblies being wrapped in uncertainty. Thenceforward, until the fifteenth year of Edward II., the legislative assemblies of England appear to have been generally, but not invariably, composed nearly in the manner in which the assembly in the twenty-third of Edward I. was constituted. The declaratory statute of the fifteenth of Edward II. gave the sanction of Parliament to the constitution of the legislature as it then stood, under which the legislative power was declared to be in the king, "by the assent of the prelates, earls, and barons, and commonalty of the realm, according as it had been heretofore accustomed." And after this period, the constitution of the legislative assemblies of England nearly approached the form which it now presents.<sup>2</sup>

Whilst the appropriate functions of the several orders and estates of the realm were thus being gradually developed and matured, the divers elements of which the nation itself was composed were uniting together. From the grant of Magna Carta by John the nation became one, and gradually began to realize its unity. The work of amalgamation, consolidation, and of continuous growth, in progress during the century which succeeded the Norman conquest, was completed under successive monarchs, from John to Edward I.<sup>3</sup> In the reign of Edward I., the protracted struggle between Englishmen, of whatever race descended, and the foreigners who had devoured their substance and overthrown their liberties, finally came to an end. By the efforts of this prudent monarch, the English and the Normans were joined together in a common bond of mutual helpfulness, ancient freedom was revived, and the national institutions began to assume "those

M. Goodwin, London, 1876; Prothero's *Life of Simon de Montfort*, London, 1877.

<sup>1</sup> Stubbs, v. 2, pp. 128, 223, 253.

<sup>2</sup> *First Lords' Report*, *Lords' Pap.* 1829, v. 10, pp. 154, 254, 389-391, 473; and see *Freeman's Growth of Eng. Const.* c. ii.; Cox, *Ant. Parly. Elec.* pp. 68-85 and 96; Syme, *Rep. Govt.* c. i.

<sup>3</sup> Stubbs, *Const. Hist.* c. xiii. xiv. xv.

constitutional forms which, with mere changes of detail, they have preserved uninterruptedly ever since."<sup>1</sup>

The century that followed Magna Carta was likewise a period of growth and development, wherein the three estates became conscious of their distinct identity, and entered upon their separate and appropriate spheres of labour.<sup>2</sup>

It was during the reign of Edward I. that the barons, who had hitherto monopolized the ear of the sovereign, and controlled his policy, realized the existence of a new power which it was needful for them to conciliate. The citizens and burgesses, who had accumulated wealth by honest industry, and who were able and willing to contribute to the necessities of the state, were

The barons forced to recognize the rights of the burgesses.

altogether excluded from the national councils. Whether or not this was esteemed a grievance, at this period, it is hard to conjecture: this much at any rate is certain, that they stoutly objected to pay any taxes that were levied upon them without their consent. In 1297, after a fruitless endeavour, on the part of the king, to exact the levy of a rate on the "communaute" of the kingdom, which they had not agreed to pay, several of the principal peers interposed on their behalf, and obtained a guarantee from the king that no such illegal taxation should be again attempted. Shortly afterwards, the king convened a parliament, wherein this fundamental principle of English liberty was solemnly ratified, by the statute *De Tallagio non concedendo*, which provides that "no tallage or aid shall by us or our heirs be imposed or levied in our kingdom without the will and assent of the archbishops, bishops, barons, milites, burgesses, and the other freemen of our realm."<sup>3</sup>

<sup>1</sup> Freeman, v. 1, pp. 6, 122; and Stubbs, c. xv.

<sup>2</sup> Stubbs, v. 1, p. 637.

<sup>3</sup> Cox, *Ant. Parly. Elecs.* pp. 71, 77; Stubbs, v. 2, p. 142. And here we may notice a practice which prevailed in the early periods of English constitutional history, and which is followed almost universally in other countries where parliamentary government is now established, namely, the payment of wages to representatives. Peers invariably attended parliaments at their own expense, that being one of the services they were obliged to render for the baronies they held of the crown. But as soon as the smaller tenants of the king *in capite*, or freeholders, were permitted to appear by representation, they were subjected to pay the expenses or wages of their representatives. This custom of representatives receiving, and their constituents paying, wages began from a principle of equity,

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Once they obtained an entrance into the great council, the lesser orders speedily began to acquire influence and authority. The growth of the power of the commons is distinctly traceable under Edward II. In the preceding reign, in conformity with the usages of an earlier period, the functions of the commons were limited to a declaration of the extent of the

A.D. 1307.

Rising power  
of the  
commons.

grants which they were empowered by their constituents to offer to the crown. But in the time of Edward II. the right of the commons to a share in the making of laws was formally acknowledged ; and, by the latter part of the reign of Edward III., the power of the commons had so greatly increased that we find them strenuously resisting attempts to impose inordinate taxation, and boldly remonstrating with the king upon his choice of unworthy advisers.<sup>1</sup>

About this period there was a further development of the power of the commons, in relation to the mode of granting aids and supplies to the crown. In the reigns of Edward I., II., and III., it had been customary for the lords, the clergy and the commons, severally and separately, to determine the proportion of their respective grants, on the principle that they each represented distinct and independent portions of the community.<sup>2</sup> Nevertheless, it was obviously desirable that there should be a mutual understanding between the several estates on this subject, as neither would choose to be subjected to a higher rate than the other. It was also expedient that this agreement should be arrived at before any communication upon the matter of supply was made by the commons to the crown. This gave rise to the practice of conferences between committees of the lords and commons preliminary to the grant of supply, upon which occasions each estate counted it

without any positive law ; and so continued from 49 Henry III. (A.D. 1265) to 18 Richard II. (A.D. 1394), when a law was passed to regulate and enforce it. The practice prevailed, generally, until the reign of Charles I., and in certain parts of the kingdom to a much later period, when it gradually fell into desuetude (Henry's *Hist. of Gr. Britain*, 5th ed. v. 10, p. 61 ; *Hots. Prec.* v. 2, p. 78, n.).

<sup>1</sup> Cox, *Ant. Parly. Elecs.* pp. 84, 93.

<sup>2</sup> Hatsell, *Prec.* v. 3, p. 95. The three estates of the realm originally sat together in one chamber. When they first began to sit apart is uncertain. Their division into two houses must have been accomplished at any rate not later than 1341 (Stubbs, v. 2, p. 377, n. ; v. 3, p. 430).

an advantage to obtain a knowledge of the intentions of the other before disclosing its own.<sup>1</sup>

Up to the time of Edward III., it is not easy to define wherein the functions of the national assembly differed from those which appertained to the king's particular council. The judgments of the ordinary council would undoubtedly derive additional weight and solemnity from being delivered in parliament; and the king himself was probably more ready to receive petitions for redress of grievances when surrounded by all his councillors. The chief point of difference, however, appears to have been that, after the commons were incorporated into the national assembly, a considerable time elapsed before they were permitted to take part in any act or proceeding which bore a judicial character. But in the reign of Edward III. there are instances wherein the commons claimed to participate in the exercise of remedial justice;<sup>2</sup> and, before the decease of that monarch, we find all the governmental institutions of England—namely, a king's council, a parliament of two chambers (into which the ancient great baronial council had gradually merged), and courts of law—in distinct shape and harmonious exercise.<sup>3</sup>

A.D. 1327.

Functions of parliament.

A.D. 1407.

<sup>1</sup> Cox, *Ant. Parly. Elecs.* p. 98; *Parl. Hist.* v. 1, pp. 110, 140, 163-171. In the ninth year of Henry IV. the commons complained to the king of the lords, for having made known to his Majesty certain particulars in regard to a proposed subsidy before it had been finally agreed upon by both houses, a proceeding which they affirmed to be "in prejudice and derogation of their liberties." The protest was successful. The king, with the assent of the lords, made an ordinance declaring that "the lords on their part, and the commons on their part, shall not make any report to the king of any grant by the commons granted, and by the lords assented to, nor of the communications of the said grant, before the lords and commons be of one assent and accord; and then in manner and form as has been accustomed, that is, by the mouth of the speaker of the commons." This was another triumph on behalf of the commons, which tended to aggrandise their authority, especially with reference to the grant of public money (Cox, *Ant. Parly. Elecs.* p. 100).

<sup>2</sup> Stubbs, v. 2, p. 604.

<sup>3</sup> Palgrave, *King's Council*, pp. 22, 64; Dicey, p. 13; *First Lords' Report*, *Lords' Pap.* 1829, v. 10, p. 169. The "great councils" continued for a time to be occasionally convened even after their most important functions had devolved upon parliament. "Some hundreds of years afterwards," in 1640, Charles I. sought to find a substitute for the parliament, with which he had hopelessly quarrelled, by reviving the long-disused baronial "council." But the endeavour to resuscitate an



By the end of the fourteenth century the House of Commons had attained to its full share of political power, in the recognition of its right to represent the mass of the nation, and the vindication of its claim to exercise the powers which in the preceding century had been exclusively exercised by the baronage.<sup>1</sup>

Edward III.'s legislative assemblies were vigilant asserters of popular rights. They obtained from their sovereign repeated confirmations of the Great Charter, and succeeded in establishing three essential principles of government—namely, the illegality of raising money without consent of Parliament; the necessity that both houses should concur in any alteration of the law; and the right of the commons to inquire into abuses, and impeach the councillors of the crown for acts of corruption.<sup>2</sup>

The reign of Edward III. was, in fact, a great constitutional epoch. Independently of the organic changes in the composition of parliament which characterized this period, it was also remarkable for the frequent holdings of the great national assembly, and for the passing of a law which rendered it imperative upon the king to meet his parliament "every year once, and more often if need be."<sup>3</sup> As a rule, under the Plantagenet sovereigns, the parliaments were newly elected every time they were convened, and not kept alive from year to year by prorogations.<sup>4</sup>

From the latter part of the reign of Edward I. until the early part of the reign of Henry VIII., being a period of 213 years, it was customary for the monarchs of England to consult frequently with the great council of the nation. A year would seldom elapse without a parliament being convened, and sometimes two or three

obsolete tribunal served only to widen the breach between the king and his people, and to precipitate his downfall (see Dicey, p. 13; Knight, *Pop. Hist. of Eng.* v. 3, p. 438; Hearn, *Govt. of Eng.* pp. 407, 461).

<sup>1</sup> Stubbs, v. 2, pp. 306, 390, 401; v. 3, pp. 256, 377.

<sup>2</sup> Taylor, *Book of Rights*, pp. 67, 68; Cox, *Inst. Eng. Govt.* p. 229; *Parl. Hist.* v. 1, p. 141.

<sup>3</sup> 4 Edw. III. c. 14, confirmed by 36 Edw. III. c. 10.

<sup>4</sup> Stubbs, v. 2, p. 613; v. 3, p. 380; Smith, *Parl. Remem.* (1865), p. 7. The prorogation and reassembling of the same parliament appears to have first occurred in the reign of Henry VI. But it was not until the accession of Henry VIII. that it became an habitual practice (Parry, *Parlts.* pp. 57-59).

meetings would take place within twelve months. It has been ascertained that, in the interval above mentioned, upwards of two hundred separate parliaments were assembled. They usually sat for a period varying from four to thirty days; but, occasionally, the sessions were protracted for several months.<sup>1</sup>

Frequent  
meetings of  
parliament.

And here we may notice, that it had long been customary for the king's councillors, as confidential servants of the crown, to be present at every meeting of the "Magnum Concilium," or High Court of Parliament. The select or (as it was afterwards designated) "Privy Council" were uniformly required by the sovereign to assist at the deliberations of the great council. But it should be borne in mind that the Court of Parliament of this age really signified the House of Lords, and that, in a judicial sense, the terms were and still are synonymous.<sup>2</sup> It was contended by Sir Matthew Hale that in very ancient times, before the reign of Edward I., and perhaps down to the middle of the reign of Edward III. (by which period, at any rate, the Lords and Commons had regularly formed themselves into separate legislative chambers), the Privy Council had an essential right not merely to advise, but also to vote, in the judicial determinations of parliament.<sup>3</sup> Recent authorities, however, are of opinion that this is erroneous. The privy councillors undoubtedly formed part of the great council, or Court of Parliament, but it is most probable that they merely "gave reasons," without voting—as is still done by the assistants in the House of Lords, when required. It is evident, at any rate, that about the time of Edward III. those who sat in parliament, by virtue of their office as king's councillors, began to be regarded in the light of assistants or advisers merely, whilst the authoritative and judiciary power was exercised by the House itself.<sup>4</sup> And Sir Matthew Hale admits that, though "they were assistants of such a nature, quality, and weight, that their advice guided matters judicial and judicial proceedings in the Lords' House," yet "they had no voice in passing of laws," but only "spake their judgments and gave their reasons" in matters of judicial

The Privy  
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<sup>1</sup> Parry, *Parlts. of Eng.* pp. 55, 59; Stubbs, v. 2, p. 612.

<sup>2</sup> Macqueen, *Prac. of Lords and Privy C.* pp. 671, 680.

<sup>3</sup> Hale, *Jurisdic. H. of Lords*, p. 85.

<sup>4</sup> Macqueen, p. 674; Palgrave, *King's Council*, p. 64.

concern.<sup>1</sup> The Commons, meanwhile, having secured their own position as an integral part of parliament, and having acquired the right of impeachment, laboured to prevent the council from exercising any extraordinary jurisdiction, or powers not distinctly warranted by law, when acting independently of parliament. This point they also gained.<sup>2</sup>

Gradually the connection which originally subsisted between the Privy Council and the Court of Parliament, *i.e.* the House of Lords in their judicial capacity, came to be dissolved—though not without leaving traces in existing usage of the old relations—and the Privy Council began to assume a separate and independent jurisdiction of its own.

This change took place under Richard II., when the council was entirely separated from parliament, and entered upon its appropriate functions as a distinct tribunal. With the sanction of Parliament its separate duties were defined, and thenceforward its authority was acknowledged without any further opposition, save only when it attempted to interfere in matters beyond its jurisdiction.<sup>3</sup> The council continued to gain strength and influence until it attained the climax of its powers under the Tudor princes, whose policy was to increase the authority of the Privy Council, and to govern as much as possible without the aid of parliaments. A notable instance of this is afforded in the reign of Henry VIII., which lasted for nearly forty years, during which period parliament did not sit in all for more than three years and a half; and during the first twenty years the duration of all its sessions put together was less than a twelvemonth.<sup>4</sup>

It will not fail to be observed that the presence, from the very first, of the members of the king's Privy Council in the great council or Court of Parliament was a foreshadowing of the more intimate relations which were afterwards established between the ministers of the crown and the legislature under parliamentary government.

In the continuous growth of free institutions which so happily distinguishes the reigns of our English monarchs from

<sup>1</sup> Hale, *Lora's Jurisdiction*, p. 71.

<sup>2</sup> Palgrave, *King's Council*, pp. 9, 826.

<sup>3</sup> *Ib.* pp. 78, 80, 84, 97.

<sup>4</sup> Macqueen, pp. 675, 680.

the accession of Henry III., a remarkable incident is recorded, of the time of Edward II., which manifests a decided recognition, in that early period, of constitutional relations between the sovereign, his ministers, and parliament. In 1316, the Earl of Lancaster, who had heretofore been a prominent

Relations  
between the  
king and his  
ministers.

A.D. 1316.

leader of a powerful confederacy of discontented barons, was himself invited by the king to become president of his council. The earl agreed to accept office on certain conditions, and, on these being complied with by the king, was duly installed in open parliament; his oath, or protestation, which embodied the stipulations which he had made, was ordered to be entered upon the rolls of parliament. After reciting the terms of the appointment, it proceeds as follows: "So as at any time, if the king shall not do according to his directions, and those of his council, concerning the matters of his court and kingdom, after such things have been shown him, —and that he will not be directed by the counsel of him, and others—the earl, without evil will, challenge, or discontent, may be discharged from the council;" and that "the business of the realm" shall not be done without the assent of the members of the council; and if the council "shall advise the king, or do other thing which shall not be for the profit of him and his realm, then, at the next parliament, by the advice of the king and his friends, they shall be removed." The entry on the roll concludes with these emphatic words, which show that the order in the present case was the general and acknowledged rule in similar circumstances: "And so it shall be, from parliament to parliament, as to them and every of them, according to the faults found in them."<sup>1</sup>

Nearly one hundred years later, in the reign of Henry IV., we meet with a similar instance of the acknowledgment of the right of a minister of state to relinquish his office, without offence to the king, when he found himself unable to continue to discharge the same to the public welfare. It is thus noted by Sir Harry Nicolas: "In May, 1406, the king having taken into his consideration the numerous claims upon his time and attention, in the affairs of the kingdom, appointed three bishops, six temporal peers, the chancellor, the treasurer, the keeper of the privy seal, the

A.D. 1406.

<sup>1</sup> *Parl. Hist.* v. 1, p. 64; Parry, *Parlts. of Eng.* p. 80.

steward and chamberlain of his household, and three other persons, members of his Privy Council, and commanded them to exert themselves as much as possible in promoting the welfare, and in maintaining the laws and statutes, of the realm. The king then directed that all Bills indorsed by the chamberlain, and letters under the signet addressed to the chancellor, treasurer, and keeper of the privy seal, should thenceforward be endorsed by, or be written with the advice of, the council." None of the officers aforesaid, or any others, were "to grant any charters of pardon, or collations to benefices, except with the advice of the council; and, for the greater security and independence of its members, the important condition was added, that they might resign whenever they found themselves unable to perform their duties with advantage to the king's service, without their retirement exciting his displeasure."<sup>1</sup>

A.D. 1376.

King's council  
regulated by  
parliament.

But meanwhile parliament had begun to direct its attention to the character and composition of the king's council.

From the time of Henry III.'s minority to the close of the fourteenth century the National Council had repeatedly preferred a claim to limit the irresponsible power of the king by the election of the great officers of state in parliament. But it is doubtful whether—unless in one or two exceptional cases—the right claimed was ever exercised: the commons seem generally to have been satisfied when the king informed Parliament of his nominations, and to have tacitly approved of them. But it is curious to note this claim, as a foreshadowing of the most extreme pretensions of parliamentary government.<sup>2</sup>

In the last year of the reign of Edward III., the commons undertook to represent to the king, that it would be for his advantage, and that of the whole realm, if he would increase his council with ten or twelve "lords, prelates, and others, who should be continually near the king; so as no great business might pass without the advice and assent of six, or four of them, at least, as the case required." The king acceded to this request, with a proviso that the chancellor, treasurer, and privy seal might

The commons  
advise an  
increase of  
councillors.

<sup>1</sup> Nicolas, *Proceedings Privy Coun.* v. 6, p. 146; citing *Parl. Rot.* v. 3, p. 572.

<sup>2</sup> Stubbs, v. 2, pp. 558, 610; v. 3, pp. 43, 247.

execute their offices without the presence of any of the said councillors. The commons then made further protestation of their willingness to aid the king to the utmost of their power; but pointed to the fact that, "for the particular profit and advantage of some private persons about the king, and their confederates, the realm was much impoverished." They then proceeded to impeach certain of these evil councillors, and caused them to be dismissed from the king's council, and their goods confiscated<sup>1</sup>—a proceeding which was frequently repeated during the reign of Richard II.<sup>2</sup>

Impeachment  
and dismissal  
of councillors.

Henry IV. reigned as a constitutional king; he governed by the help of his parliament, with the executive aid of a council, over which parliament both claimed and exercised a large measure of control. Henry V. followed in his father's steps, acting throughout his reign in the closest harmony with his parliament. But with the overthrow of the house of Lancaster, and the supremacy of the house of York, a reaction set in; the influence of parliament was diminished. Sessions were held less frequently, and with small results in restraining the impolicy or extravagance of the king, so that, Stubbs tells us, "the rule of the house of Lancaster was in the main constitutional, and that of the house of York in the main unconstitutional."<sup>3</sup>

In illustration of the growing power of Parliament, and of its acknowledged supremacy, in the reign of Henry IV., and in that of his son and grandson (Henry V. and Henry VI.), we find certain of the king's household removed upon petition of the commons; and parliament occupying itself in framing regulations and ordinances for the governance of the king's council and the royal household, which, being made into a statute, the council, together with all the judges, and the officers of the household, at the command of the king, take oath to observe. This is a very important assertion of the principle of ministerial responsibility.<sup>4</sup>

A.D. 1406-1455.

Henceforward, until the accession of Henry VII., the history

<sup>1</sup> *Parl. Hist. of Eng.* v. 1, p. 141; Stubbs, v. 2, pp. 562, 609.

<sup>2</sup> Cox, *Ant. Parly. Elecs.* p. 93.

<sup>3</sup> Stubbs, v. 3, pp. 72, 191, 234, 236, 267, 273.

<sup>4</sup> Nicolas, *Proc. P. C.* v. 1, p. 62; v. 3, pp. 8, 18; v. 5, p. 13; v. 6, p. 73; *Parl. Hist.* v. 1, pp. 291, 303; Forster, *Debates on Grand Remonstrance*, p. 49.



of the king's council is chiefly remarkable for the gradual development of its administrative functions, for the introduction of forms, intended to operate as constitutional restraints upon the personal exercise of the royal will, and for a corresponding increase of power on the part of the leading ministers of state of whom the council was composed. During the whole of this era, and until the close of the Stuart dynasty, the personal influence and authority of the sovereign continued to be very great, though it necessarily varied according to the ability or strength of character of the reigning monarch. With a vigorous prince upon the throne, the royal supremacy was apt to be energetically maintained to the detriment of all constitutional government, and the council to become the mere instrument of despotic will, the channel through which the royal mandates passed. At other times, the influence of a powerful nobility was exerted to curb the arbitrary exercise of kingly rule, and to aggrandize the authority of his ministers.<sup>1</sup> Moreover, the ministers themselves occupied, to some extent, an independent position. The king could indeed appoint or dismiss them at pleasure; but it was essential that he should have a council of some sort, and certain official personages necessarily formed part of every council. These were the five great officers of state above-mentioned—viz. the chancellor, the lord treasurer, the keeper of the privy seal, the chamberlain, and the steward of the household, who all had seats at the council board *virtute officii*. In addition to these functionaries, the council usually included the Archbishops of Canterbury and York, and from ten to fifteen other spiritual or temporal lords, or men of mark, who possessed the confidence of the king and of parliament. For, while the sovereign had an absolute right to appoint or remove his councillors at pleasure, the English monarchs appear to have been generally careful to choose men as their advisers and ministers who were acceptable to the lords and commons.<sup>2</sup> Some of the official members of the council, during this period, held offices which were not in the direct gift of the crown, but were hereditary in certain families. Again, the presence of

A.D. 1485.

Development  
of the council.

Its com-  
position.

Growing power  
of the council.

<sup>1</sup> See Dicey, *Privy Council*, p. 16; Stubbs, v. 2, pp. 312, 499, 514, 568; v. 3, pp. 247, 250.

<sup>2</sup> Sir H. Nicolas, *P. C.* v. 1, pp. ii. iii.

the archbishops and other ecclesiastics imparted a dignity and independence to the body otherwise unattainable. With such a position it was not difficult for a refractory council to cause its power to be felt. They were privileged to approach the sovereign with advice or remonstrance upon any matter affecting the common weal. Their rebukes might indeed be disregarded, and their council overruled; but the moral effect of their interposition could not be ignored.

What added materially to the weight and influence of the council was that, through the instrumentality of the chancellor, they could refuse to give effect to the king's wishes, or to legalize his grant; for, from a very early period, they had claimed to take cognisance of every grant or writ issued by the king. The "great seal" remained in the custody of the chancellor, and could not be affixed to any document except by his hand. It is true that this rule was often regarded by sovereigns as a vexatious and unwarrantable restraint; and that they sought to escape from it, either by retaining personal possession of the great seal, or by claiming that signature by means of smaller royal seals (which at first were kept in the king's own hands) was sufficient to authenticate any writ or other missive. But parliament remonstrated against such practices, and claimed that a rule, which was a protection to the crown itself against fraud, should be strictly enforced. At length the privy seal passed into the hands of a regular officer, when it was maintained by the lawyers, though contested by the crown, that the great seal ought to be affixed to no bill on a verbal warrant, or otherwise than upon a formal writ of privy seal.<sup>1</sup> These circumstances contributed to confer upon the king's council great and increasing weight and influence.

Moreover, upon constitutional grounds, this doctrine in regard to the seals was of obvious necessity: for the chancellor could not prove that he had obeyed a royal mandate unless he had a formal warrant to show for what he had done. Yet while this plea, and probably also the convenience to the crown of throwing upon its servants a measure of responsibility for its own acts, reconciled the king to this restriction upon the free exercise of his will, the restraint was felt as peculiarly irksome by the monarchs of England during this epoch. During

<sup>1</sup> Dicey, pp. 17-20.

the reign of Edward IV., that sovereign "on many occasions enforced his directions in his letters to the chancellor by adding his commands in his own handwriting;" and once  
A.D. 1465. it is mentioned of him that he expressed his indignant surprise that the chancellor did not deem his Majesty's *verbal* commands "sufficient warrant" for the issue of a particular instrument.<sup>1</sup>

These constitutional safeguards against the unrestrained exercise of the royal prerogative were enforced, from time to time, by further regulations to the same effect. By an order of the council in the reign of Henry VI., rules were adopted which practically  
Constitutional securities.  
A.D. 1443-1444. ensured that every grant of the crown should, from the moment of its presentation as a petition or warrant, to the time of its final sanction by royal writ, be brought under the notice of the king's ministers.<sup>2</sup> In the reign of  
A.D. 1526. Henry VIII. all these rules were, in substance, re-enacted; and, so far as regards the issue of royal patents, grants, etc., they still continue in operation, with but little change—excepting that grants which were formerly superintended by the Privy Council now pass through the office of a Secretary of State.<sup>3</sup> Nevertheless, the end which was intended to be promoted by these regulations was not in accordance with the modern idea of ministerial responsibility. They were designed for the security of the crown itself, against fraudulent or unnecessary grants; and for this purpose numerous official personages were required to take part in the investigation into and decision upon petitions to the crown. They were also intended to enforce the necessity for consulting the council before the king should determine upon any application for redress. But, after all, the responsibility of ministers for the faithful discharge of their high functions was to the crown, and not to parliament.<sup>4</sup>

It was during the reign of Henry VI. that the "ordinary" or "permanent" council first assumed the name of the "Privy Council." The habitual attendants at the council, by whom

<sup>1</sup> Sir H. Nicolas, *Proc. of Privy Council*, v. 6, pp. 195, 196; Dicey, p. 20.

<sup>2</sup> See Sir H. Nicolas, v. 6, pp. 91-95.

<sup>3</sup> Cox, *Eng. Govt.* p. 648.

<sup>4</sup> Sir H. Nicolas, *Proc. P. C.* v. 6, p. 200, etc.; v. 7, p. v.; Dicey, p. 21.

the ordinary business was transacted, came at this time to be distinguished from other members of the same body who, like the judges, were only occasionally summoned by the king. <sup>A.D. 1422.</sup> During the minority of Henry VI. this distinction was the more apparent, as the whole government was in the hands of a select number of the king's council. Ordinances of council passed in this reign provide for securing privacy at council meetings, and the keeping its resolves secret, by forbidding any to attend thereat unless specially summoned. Meetings of the "great council" were occasionally held by the king's command. But it is clear that under Henry VI. a select council was gradually emerging from out of the larger body, by a process similar to that which afterwards gave birth to the Cabinet from the womb of the Privy Council.<sup>1</sup>

The business which engaged the attention of the king's council during the epoch under review was of the most multifarious description, and its proceedings exhibit an extraordinary combination of the executive and legislative functions of the government. Grave affairs of state, and questions of domestic and foreign policy; the preservation of the king's peace, and the management of the public finances; the affairs of aliens, the regulation of trade, the settlement of ecclesiastical disputes, and the defence of the faith against heretics and sorcerers—all these subjects, as appears from the minutes which have been preserved of the proceedings of council, formed part of its ordinary administrative labours. Together with these important matters the time of the council was occupied, as that of every government must be, with an infinite number of trivial cases. And, although law-courts had been established for the determination of every species of action or suit, we still find the council exercising judicial functions, not merely for the preservation of the public peace, but for the trial of ordinary offenders. Whenever, in fact, either from defect of legal authority to give judgment, or from want of the necessary power to give effect to their

<sup>1</sup> Dicey, pp. 22, 23; Nicolas, *Proc. P. C.* v. 1, p. 73; v. 5, pp. 22, 23; v. 6, pp. 61, 81, etc.; Stubbs, v. 3, p. 251. [The select council gradually emerged from the larger council from the reign of Henry III. (*vide infra*, pt. iii. ch. 1). In the reign of Henry VI. it first assumed its modern name of the Privy Council.—*Editor*.]

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decisions, the law-courts were likely to prove inefficient, the council interposed, by summoning before it defendants and accusers. A tribunal of this description was doubtless useful in the infancy of regular institutions for the security of life and property, but its action was arbitrary and capricious. It was regarded with a natural jealousy by parliament, and from the reign of Edward III. to that of Henry VI. the Commons made vigorous efforts, on repeated occasions, to prevent the council from interfering with matters which belonged to the courts of law, and from illegally infringing upon the property and liberties of the people.<sup>1</sup>

The records of the Privy Council during the reigns of Edward IV., Edward V., Richard III., and Henry VII. have not been preserved, so that nothing certain is known of the constitution of the council under those monarchs.

With the accession of the Tudor dynasty, the position of the Privy Council towards the monarch underwent a noticeable change. The history of the council, from the accession of Henry VII. to the sixteenth year of Charles I., is the history of regal supremacy, potentially exercised through a body of ministers, who had ceased to be a check upon the royal will. This new position of the council towards the crown was mainly brought about by the introduction therein of a number of commoners, who owed their position and influence entirely to the king's favour. The new councillors were doubtless men of mark and ability, but, unless noble by station, they could not be independent of the crown. And, where hereditary offices were held by peers, it frequently happened that a deputy was chosen from amongst the commoners, to perform the duties and exert the influence of the post. This gave additional strength to the crown, and was the means of rendering the government more efficient, but it greatly undermined the independence of the council.<sup>2</sup> The change in the composition of the Privy Council did not escape the notice of the common people, by some of whom it was regarded with much dissatisfaction. About twenty-five years after the accession of Henry VIII. there was a rising in Yorkshire. The malcontents demanded of the king redress of grievances. One of their complaints was

A.D. 1485.

Dependence of  
the council on  
the king.

A.D. 1536.

<sup>1</sup> Dicey, pp. 25-34; Nicolas, *Proc. P. C.* v. 1, p. ii.

<sup>2</sup> Dicey, pp. 38-42.

that the Privy Council was then formed of too many persons of humble birth, whilst at the commencement of his Majesty's reign it had been otherwise. The king <sup>Complaints against the council.</sup> told them, in reply, that at his accession there were in the council "of the temporality but two worthy calling noble, the one treasurer of England, the other high steward of our house; others, as the Lords Marney and Darcey, but scant well-born gentlemen, and yet of no great lands until they were promoted by us, and so made knights and lords: the rest were lawyers and priests, save two bishops, which were Canterbury and Winchester." Henry proceeded to show that there were then "many nobles indeed, both of birth and condition," in the council; but, in conclusion, he informed the rebels, very emphatically, "that it appertaineth nothing to any of our subjects to appoint us our council, ne we will take it so at your hands. Wherefore, henceforth, remember better the duties of subjects to your king and sovereign lord, and meddle no more of those nor such-like things as ye have nothing to do in."<sup>1</sup>

The altered relations between Church and State at this period, consequent upon the Reformation, contributed greatly to increase the authority of the crown. No longer dependant on a foreign potentate, but on the king himself, the dignitaries of the Church imparted a new vigour to the monarchy, when they ceased to be the representatives of a rival power. But, in proportion as the personal authority of the sovereign increased, the influence of the Privy Council was weakened. The records of the time bear ample testimony to the condition of servility and dependence upon the sovereign to which the council at this epoch had been reduced.<sup>2</sup>

Meanwhile, however, the power of the council as an administrative body was in nowise diminished. On the contrary, this was emphatically the age of "government <sup>Government by councils.</sup> by councils." "Unconstitutional and arbitrary as many of the ordinances of council in the fifteenth century now appear, they almost seem mild when compared with many of those of the Privy Council of Henry VIII. Combining much of the legal authority with the civil and political, it exerted a despotic control over the freedom and property of every man

<sup>1</sup> Sir H. Nicolas, *Proc. P. C.* v. 7, pp. 3, 4.

<sup>2</sup> Dicey, pp. 42, 43.



in the realm, without regard to rank or station. Its vigilance was as unrelenting as its resentment was fatal; and its proceedings cannot be read without astonishment, that the liberties and constitutional rights of Englishmen should ever have recovered from the state of subjugation in which they were then held by the crown."<sup>1</sup> Chiefly concerning itself in securing the internal tranquillity of the kingdom, and in detecting and punishing treason or sedition, the Privy Council also directed its attention to "nearly everything connected with the conduct of individuals towards each other, and in relation to the government." It interposed in matters of private concern, making itself the arbitrator of quarrels between private individuals—thereby encroaching upon the province of the established courts of law. It likewise interfered in ecclesiastical affairs, when its proceedings were often of the most despotic character. In all matters brought before it the council exercised a very summary jurisdiction, either punishing offenders by committing them to the Tower, or by fine, or imprisonment, or both.<sup>2</sup> Reviewing the proceedings of the Privy Council during this period, Sir Harris Nicolas is of opinion, "that the arbitrary and unconstitutional powers, which the government then exercised, arose less from the personal character of the reigning monarch, congenial as despotism was to his feelings, than from a gradual encroachment on the liberties of the people, and a corresponding extension of the prerogatives of the crown, during the latter part of the fifteenth, and continued until the middle of the sixteenth century. This innovation may probably be traced to the usurpation of Richard III., followed by the usurpation of Henry VII.; it being scarcely possible for the liberties of a country to survive two revolutions, or for a successful rebel not to become a tyrant."<sup>3</sup>

From the constitution of the Privy Council under the Tudor sovereigns, it might be supposed that every political measure, if it did not originate with the Council, was at any rate deliberated upon by that body. But such was not the case. "Henry VIII. was in the

Power of the  
crown under  
Henry VIII.

<sup>1</sup> Sir H. Nicolas, *Proc. P. C.* v. 7, p. 24.

<sup>2</sup> *Ib.* pp. 25, 26, 31, 45, 49.

<sup>3</sup> *Ib.* p. 66. And see *State Papers*, published by commission, containing correspondence between the King and Cardinal Wolsey, v. 1.

fullest sense of the word his own minister; and all the most important matters, particularly in relation to foreign policy, proceeded immediately from his own mind, and were conducted upon his own judgment." The modified form of ministerial responsibility which we have seen established by command of Henry IV., and which continued to be enforced in subsequent reigns, was set at nought by Henry VIII., as appears from transactions recorded in State Papers of the period: "As there were some occasions on which he did not even consult his favourite minister, it may be inferred that there were many more on which he acted without the advice of his council."<sup>1</sup> For a time Wolsey was his favourite, and then Cromwell; but, after the fall of Cromwell, no one minister bore even the slight resemblance presented by these statesmen to a modern premier. In fact, Henry issued his commands to any of his ministers, without regard to their peculiar duties; but, "as no responsibility to the country was incurred, it mattered little whom the king selected to carry his orders into effect. He was himself the centre from which every measure emanated, and his ministers had nothing more to do than to receive his commands and obey them. But all communications between the ministers and the king, relating to the affairs of government, seem, even in that arbitrary period, to have been made through a privy councillor; so that the forms of the Constitution were, in this important point at least, strictly adhered to; and, however forgetful parliament might have been of its duties, means always existed of fixing the responsibility for the acts of the crown upon those to whom, according to the laws, it entirely and exclusively attaches."<sup>2</sup>

During the reign of Henry VIII., the greater part of the members of the Privy Council appear to have been in regular attendance upon the king; accompanying him wherever he went, and giving their daily attention to the business of the state. These were usually the great officers of the household, a bishop, and one of the principal secretaries; whilst other functionaries—such as the Lord Chancellor, the Archbishop of Canterbury, the other principal secretary, and a few minor officials—remained in London, to dispose of the ordinary and routine affairs of government. Occasionally, however, the

<sup>1</sup> Sir H. Nicolas, *Proc. P. C.* v. 7, pp. 11, 12.

<sup>2</sup> *Ib.* pp. 14, 15.

whole council assembled together, either for ordinary purposes, or at the special command of the king.<sup>1</sup>

By means of rules adopted for its internal improvement, the Privy Council was brought to a high state of efficiency for the discharge of the numerous and important duties which devolved upon it at this period. In 1553,

Division of  
council into  
committees.

King Edward VI. drew up a series of regulations for his council, under which the whole body (which then consisted of forty persons) was divided into five commissions, or (as they would now be termed) committees, to each of which was assigned a distinct branch of public business. Upon some of these committees certain persons, mostly judges, were placed. They were styled "ordinary councillors," and were not consulted on questions of general policy. This practice has been adhered to to the present day. It was also provided, by these new regulations, that every matter should be brought under the royal notice, that "if there arise such matters of weight as it shall please the king's majesty to be himself at the debating of, then warning shall be given, whereby the more shall be at the debating of it," and that the secretaries should be the channel of communication between the councillors and their royal master.<sup>2</sup>

The office of secretary, or king's clerk, it may be here remarked, was originally held in small estimation. The secretary possessed no political influence, unless, as sometimes happened, he was a member of the council. At length it became necessary to appoint two secretaries, after which, by almost imperceptible degrees, the dignity of the office was increased. During the reign of Henry VII. persons of weight were selected to fill the post. In the following reign we find the secretaryship held by Cromwell. Henceforth the secretaries take rank with barons, are always members of the council, and by the Act 31 Henry VIII. c. 10, become entitled to this position *ex officio*. But it was not until the latter part of the reign of Elizabeth that we find them designated Secretaries of State.<sup>3</sup>

<sup>1</sup> Sir H. Nicolas, *Proc. P. C.* v. 7, pp. 9, 10, 15.

<sup>2</sup> Dicey, pp. 39-43. From a very early period it would seem to have been the practice for the council to meet for the ordinary transaction of business without the king being present. But the sovereign was evidently at liberty to attend whenever he thought fit (Sir H. Nicolas, *Proc. P. C.* v. 1, pp. 25, 34, 58; v. 7, p. 13; Dicey, p. 15).

<sup>3</sup> Dicey, p. 41; Thomas, *Notes on Pub. Dep.* p. 27.

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By the regulations of 1553,<sup>1</sup> all the business of the Privy Council was transacted through committees which were variously modelled, as occasion required. The same persons sat on different committees. From this arrangement a body known in history as the Star Chamber came into existence, and acquired evil fame from its arbitrary and tyrannical proceedings. The Star Chamber was, in effect, the council under another name. It was frequently presided over by the king himself, and even in his absence transacted business with great dignity and solemnity; hence it will be seen that the council had abated none of its ancient pretensions to the plenary exercise of judicial power. Besides asserting the right to act in almost every case where a law-court had jurisdiction, the king and his councillors avowedly acted "in cases not examinable in other courts." The secret tribunal of the Star Chamber continued in operation up to the reign of Charles I., when the struggles of parliament against the judicial authority of the council, so long intermitted, were again revived with accumulated vigour, until (by the statute 16 Car. I. c. 10) it was determined that "neither his majesty nor his Privy Council have, or ought to have, any jurisdiction, power, or authority, by English bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of, the lands, tenements, hereditaments, goods, or chattels of any of the subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of the law." By the same statute, the power "that the Council Table hath of late times assumed unto itself, to intermeddle in civil causes and matters only of private interest between party and party," is declared to be "contrary to the law of the land, and the rights and privileges of the subject." The Star Chamber, with its cognate jurisdictions, was accordingly by this Act swept away, and the most part of those judicial powers, which the state policy of former generations had bestowed upon the council, were abolished.<sup>2</sup>

<sup>1</sup> *Vide supra*, p. 42.

<sup>2</sup> Sir H. Nicolas, *Proc. P. C.* v. 7, p. 24. Dicey, pp. 45-57, which gives a curious and minute account of the doings of the Star Chamber. See also Palgrave, *King's Council*, pp. 38, 100, 110; Stephen, *Hist. of Crim. Law of Eng.* v. 1, c. vi.

During this period of "government by councils," the privy councillors, in addition to their potent authority as members of a board of such pre-eminence in the state, assumed the right of arresting their fellow-citizens at their own individual discretion. It may be thought that such an act would have been justified by the use of the king's name. But the councillors claimed the authority as pertaining to themselves, and the judges admitted the validity of their claim, so far at least as commitments "by order of the Council Board" as well as by royal command were concerned.<sup>1</sup>

The government of Queen Elizabeth was conducted almost exclusively through the medium of her Privy Council, individually or collectively; parliaments (though regularly convened at intervals of from one to four years) being regarded by her as mere instruments of taxation, to which she abstained from resorting except upon necessity. The practical disuse of parliaments during the Tudor dynasty naturally led to a larger assumption of jurisdiction on the part of the Privy Council, which retained much of the authority thus unlawfully acquired, even after the recurrence by later sovereigns to the constitutional services of parliament.<sup>2</sup>

The powerful system so elaborately matured by the Tudor sovereigns expired with them; and the period between the death of Elizabeth and the restoration of the Stuarts may be considered as the time when "government by councils" came to an end.<sup>3</sup> But meanwhile, the parliaments of Elizabeth, unlike their timid predecessors in previous reigns, were remarkably outspoken; and the commons did not hesitate to tender their advice to the queen, not merely upon affairs of

Church and State, but even upon the more delicate topics of a royal marriage and the succession to the throne. True, they were repeatedly commanded not to interfere in any matters touching her Majesty's person, estate, or church government, but such as might be propounded to them by the queen herself; yet they made good their claims to a higher consideration, by successfully asserting the necessity for redressing the various grievances affecting the commonwealth.<sup>4</sup> And so there followed in due

<sup>1</sup> Dicey, p. 56.

<sup>2</sup> Macqueen, *Privy Council*, p. 680.

<sup>3</sup> Dicey, p. 59.

<sup>4</sup> See Parry's *Parlts.* pp. 214-239; Hearn, *Govt. of Eng.* p. 132.

course, and as it were by natural consequence, "the mutinous parliament of James I., and the rebellious parliament of Charles I."<sup>1</sup> And, concurrently with these proceedings, new requirements arose on the part of the crown, which could only be met by the cordial assistance of the House of Commons. The circumstances in which the power of parliament, in contradistinction to that of the monarchy, gained strength and development under the Stuart kings, belong to general history, and need not be here enlarged upon. It will suffice to refer to two leading events, which indicate the process whereby the House of Commons attained the position, co-ordinate in power with the crown itself, which it has occupied since the revolution of 1688.

Parliament  
under the  
Stuart kings.

(i.) During the altercations between the crown and parliament, which characterized the reign of Charles I., it became necessary to provide for the maintenance of a standing army. Gradually increased, after the restoration, from 3000 to 30,000 men, it began to be regarded with great jealousy, as being calculated to strengthen the power of the crown, to the detriment of the rights and liberties of the subject. Accordingly, a provision was inserted in the Bill of Rights,<sup>2</sup> forbidding the raising or keeping a standing army within the kingdom, in time of peace, without the consent of parliament. (ii.) The practice of appropriating the supplies granted to the crown by parliament to separate and distinct services was first introduced in the time of Charles II.,<sup>3</sup> though it did not become an established usage until the revolution, when it was formally incorporated amongst the maxims of the Constitution, that the grant of supply, and the control of the public expenditure in conformity therewith, belongs inalienably to parliament, and pre-eminently to the House of Commons.<sup>4</sup> By the recognition of these two principles a salutary check was provided against the exercise of arbitrary power, and at the same time the constitutional influence of the House of Commons, as the source of all aids and supplies, was asserted and guaranteed.<sup>5</sup> From this epoch we may date

Downfall of  
prerogative  
government.

<sup>1</sup> Bagehot, *Eng. Const.* p. 311.

<sup>2</sup> 1 Will. and Mary, Sess. 2, c. 2.

<sup>3</sup> See Hearn, *Govt. of Eng.* p. 342.

<sup>4</sup> Hatsell, v. 3, p. 202; Park's *Dogmar*, lecture xiii.

<sup>5</sup> Sir J. Mackintosh, *Hans D. (O.S.)*, v. 34, p. 537; Clode, *Mil. Forces of the Crown*, v. 1, p. 84.



the downfall of prerogative government in England, and the rise of parliamentary government.

But this momentous change in our political system was not effected at once, or without an effort on the part of the crown to recover its ancient supremacy. Irritated by the opposition he systematically encountered from the House of Commons, Charles I. abstained from convoking parliament for a period of eleven years, from March, 1629, to April, 1640—a longer interval than had ever before elapsed without some meeting of the national council.<sup>1</sup> At length, in 1640, the famous Long Parliament was assembled.

The first act of this parliament was, as we have seen,<sup>2</sup> to abolish the Star Chamber, and to deprive the Privy Council of most of its judicial power, leaving its constitution and political functions unchanged.<sup>3</sup>

But in all matters of government the will of the sovereign continued supreme; and, though ministers were individually powerful, they had not, and were not expected to have, a mutual agreement in regard to public affairs. They often differed amongst themselves on important questions; but, as each minister was responsible merely for the administration of his own department, it was not considered essential that they should be of one mind on matters of state policy. The responsibility of ministers, moreover, for the ordinary fulfilment of their official functions, was practically to the king, and to him alone.

In fact, the course of events which had ensued upon the accession of Charles I. to the throne unmistakably proved that a more intimate and cordial understanding between the crown and parliament, in the conduct of public affairs, had become indispensable to the very existence of a monarchical government. For Charles I. "had not the power to guide, if he had had the chance; [his] theory

<sup>1</sup> Macaulay, *Hist. of Eng.* v. 1, p. 85.

<sup>2</sup> *Ante*, p. 43.

<sup>3</sup> After its destruction and the subsequent rise of the vast colonial empire of Britain, the ancient prerogative of the crown, as the fountain of justice, was held to vest in it; the ultimate appeal in all cases, civil and criminal, from all courts throughout the empire, was made to the King in Council; and a committee of the Privy Council, which is the direct descendant of the old *curia regis*, is to this day the organ by which that prerogative is administered (see, *inter alia*, Stephen, *Hist. Crim. Law Eng.* v. 1, p. 180).

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of sovereign right was incompatible with the constitutional theory which, rising as it were from the dead, had found its exposition among the commons."<sup>1</sup> In the protracted contest, that arose between the king and the House of Commons, much mutual misunderstanding might have been avoided if Charles had had some confidential minister to espouse his cause and defend his policy within the walls of parliament. The bitter antagonisms which arose between the king and his people might have been reconciled if only the king's ministers had not been so distasteful to the House of Commons. As it was, the servants of the crown were generally regarded by the commons with mistrust or aversion; and, if their acts merited condemnation, there was no alternative but to proceed against them by way of impeachment—a procedure which at the best was a cumbrous process, fruitful of delay, uncertain in its issue, and provocative, meanwhile, of further ill-will against the crown itself. If only some method could have been devised to enable the king's ministers to commend themselves to the goodwill of parliament, these perpetual causes of irritation might have been effectually removed.<sup>2</sup>

Overtures, indeed, on the part of the Long Parliament, were not wanting to point out to the king terms of agreement and reconciliation; and, although they involved for the most part the surrender of more power than the crown was willing to relinquish, it is remarkable that upon one occasion the principle of ministerial responsibility was distinctly adverted to, as a means of conciliating the favour of Parliament, and of protecting the king from evil counsellors. In the <sup>Grand Remon-</sup>Grand Remonstrance addressed by the House of Commons to Charles I., in 1641, reference is made to "those cases of not infrequent occurrence, when the commons might have just cause to take exceptions at particular men for being

<sup>1</sup> Stubbs, *Const. Hist.* v. 3, p. 505.

<sup>2</sup> Historians will not accept Mr. Todd's conclusion without some reserve. It was not the absence of Charles I.'s ministers from parliament which produced the rebellion, but the conduct of the king in governing without parliament, or, in some matters, in defiance of it; and the presence of these ministers would not have averted civil war unless the king had been thereby induced to modify his ideas of kingship. No mere explanation of his policy in the House of Commons by a confidential minister would have reconciled the Long Parliament to Charles I.'s arbitrary measures.—*Editor.*

selected to advise the king, and yet have no just cause to charge them with crimes." It is added that "the most cogent reasons might exist to be earnest with the king not to put his great affairs into such hands, though the commons might be unwilling to proceed against them in any legal way of impeachment." It is then plainly stated, "that supplies for support of the king's own estate could not be given, nor such assistance provided as the times required for the Protestant party beyond the sea, unless such councillors, ambassadors, and other ministers only were in future employed as parliament could give its confidence to."<sup>1</sup> But the king had already declared that he would neither separate the obedience of his servants from his own acts, nor permit them to be punished for executing his commands.<sup>2</sup> Conciliation, therefore, was impossible; the time for moderate counsels to prevail had gone by, and the downfall of the monarchy was the deplorable but inevitable consequence. The circumstances which led to this event belong to general history, and need not be dwelt upon in these pages. Suffice it to state that, after a brief contest with the Long Parliament and its adherents, Charles I. was taken prisoner, tried, and executed on January 30, 1649.<sup>3</sup>

Immediately afterwards Parliament proceeded to take steps to provide for the future government of the country. On February 7, they voted "that the office of a king in this nation was unnecessary, burthensome, and dangerous," and should be abolished; and having on the previous day decreed the abolition of the House of Peers, they ordered, "that there be a Council of State erected, to act and proceed according to such instructions as shall be given to them by the House of Commons."<sup>3</sup> In the composition of this council, the parliamentary majority were in a position to carry out their own ideas as to the sort of persons who ought to be entrusted with supreme authority, and to ensure that the administration of public affairs should be in direct conformity with their own opinions. For a time the experiment proved successful, and, thanks to the energy, learning, and political

<sup>1</sup> Forster, *Debates on the Grand Remonstrance*, pp. 272, 273.

<sup>2</sup> See Gardiner's *Hist. of Eng. 1624-1628*, v. 1, c. viii.; Campbell's *Chanc.* v. 2, p. 532.

<sup>3</sup> *Parl. Hist.* v. 3, pp. 1285, 1292; *Com. Journ.* Feb. 7, 1649.

experience of the leading men in the Council of State, the government of the country, so long as it remained in their hands, was conducted with much wisdom and ability.<sup>1</sup>

The Council of State consisted of forty-one persons, lords and commoners, who were chosen by the House of Commons in the name of "the Parliament of England," and of whom nine were a quorum for the dispatch of business. A majority of the councillors were also members of the House of Commons; and, as the average number of members attending that House did not then exceed fifty, the council naturally became the more powerful body; and, having all the public business of the nation under review, they left but little for the House to do, except to confirm, by Act, such matters as the council thought fit to submit for their sanction.<sup>2</sup> But, in point of fact, it was usual for the council to refer all matters of special importance to the consideration of the House, who were thus enabled to exercise a controlling influence over their proceedings.<sup>3</sup>

The Council of State was eminently a deliberative body, and the rules which they framed for their own guidance were calculated to ensure the most attentive and careful consideration of every subject before them, by the members present at any particular meeting.<sup>4</sup> Either directly, or through their committees, the council also transacted the business which is now apportioned amongst various departments of state. Besides affairs belonging to the Treasury, and to the different branches of the secretariat, they were charged with the trust heretofore exercised by the Lord High Admiral and by the Master of the Ordnance.<sup>5</sup> The creditable and successful manner in which their multifarious labours were accomplished is the more remarkable when it is considered that on an average eighteen or twenty members attended at sittings of the council, and that frequently the number present was much larger.<sup>6</sup>

The council was chosen for a period of one year only, at

<sup>1</sup> Bisset, *Commonwealth of Eng.* v. 1, pp. 49, 118-123.

<sup>2</sup> *Parl. Hist.* v. 3, p. 1291; Bisset, *Commonwealth of Eng.* v. 1, pp. 24, 36. The original minutes of all the proceedings of the Council of State, until its overthrow by Cromwell, are preserved in the State Paper Office, in excellent condition (*Ib.* p. 39).

<sup>3</sup> Bisset, v. 1, p. 43; v. 2, pp. 55, 57.

<sup>4</sup> *Ib.* v. 2, pp. 293-296.

<sup>5</sup> *Ib.* v. 1, p. 116; v. 2, p. 72.

<sup>6</sup> *Ib.* v. 1, pp. 118-123; v. 2, pp. 77, 293, 377, 386.

the expiration of which term all the members were re-elected except three. Two were added to supply vacancies by death, so that there were in all but five new members. But at the end of the second year parliament resolved to adopt a different principle. Accordingly, on February 5, 1651, they decided that the Council of State for the ensuing year should again consist of forty-one members, but that only twenty-one of the existing councillors should be capable of re-election. The same rule was followed upon the election of the council for the fourth time.<sup>1</sup> In November, 1652, anticipating the regular period by nearly three months, the council was again re-elected upon a similar principle for the fifth and last time.<sup>2</sup>

But, on April 20, 1653, Oliver Cromwell, who had always been one of the Council of State, from its first institution, having forcibly put an end to the Rump Parliament, and established himself as military dictator, went to the Council of State, who were assembled at their customary place of meeting at Whitehall, and informed the assembled members that their official existence had terminated, inasmuch as the parliament from whence their authority had been derived was defunct.<sup>3</sup> Thus ignominiously expired the famous Council of State, which had ruled England with singular vigilance and success for about four years and a quarter.

In lieu of this able and influential body, that h. <sup>4</sup> steadily refused to co-operate with Cromwell in his ambitious designs,<sup>4</sup> a phantom council was set up, consisting of seven members, six of whom were military men, to act as Cromwell's nominal advisers. But this was a mere "barrack-room council," entirely dependent upon Cromwell himself.<sup>5</sup> Subsequently the dictator convened a Council of State, which included eight officers of high rank and four civilians; but the latter served merely as a convenient screen, and the body continued to be, to all intents and purposes, a military council.<sup>6</sup> When, in December, 1653, Cromwell accepted the office of Protector of the Commonwealth, he consented to receive from parliament a council of fifteen persons, to be appointed by statute, with power, by advice of the council, to increase their number to twenty-one. But he only waited

<sup>1</sup> Bisset, v. 2, pp. 146, 234.

<sup>2</sup> *Ib.* p. 369.

<sup>3</sup> *Ib.* p. 467.

<sup>4</sup> *Ib.* p. 452.

<sup>5</sup> *Ib.* pp. 475, 476.

<sup>6</sup> Forster, *British Statesmen* (Cromwell), v. 7, p. 129.

until he was firmly seated upon the presidential chair, to proceed to act, in most important matters, without an order of council, and without, as it would seem, even consulting his legal advisers.<sup>1</sup> The several parliaments convened by Cromwell during his protectorate proved for the most part refractory and unmanageable; and it was entirely owing to his own extraordinary vigour and administrative skill that his government achieved the measure of success which, especially in the foreign relations of England, has been generally and deservedly associated with his name.<sup>2</sup> Cromwell's dictatorship lasted for five years, when it was ended by his death, which occurred on September 3, 1658. After a brief period of anarchy, the nation, tired of intestine strife, gladly welcomed the restoration of the monarchy.

Restoration of  
the monarchy.

With the accession of Charles II. a new and transitional period began, during which parliament continued to increase in strength and influence, while the old antagonisms between the ministers of the crown and the House of Commons were revived with all their former bitterness. The inveterate misgovernment of the restored line of Stuarts<sup>3</sup> finally brought about the revolution of 1688, an event which not only produced a change of dynasty, but was the means of confirming our national liberties, and placing them upon a more secure foundation. By the introduction of the king's ministers into parliament at this epoch harmonious relations were at length established between the crown and the legislative bodies, and the old abuses of prerogative government were abolished for ever.

Revolution of  
1688.

In reviewing the history of the English Constitution from the Norman conquest until the accession of William of Orange, certain points appear deserving of especial mention. First, the seeds of the present political system of Great Britain were sown in the earliest days of our national existence, begetting fruit which has since continuously matured. Second, the responsibility of advising the crown in all affairs of state belonged originally to the Privy Council, an institution which is as old as the monarchy itself.

Development of  
our national  
polity.

<sup>1</sup> Forster, *British Statesmen* (Cromwell), v. 7, p. 231, n.

<sup>2</sup> See Goldwin Smith's lecture on Cromwell in his *Three Eng. Statesmen* (London, 1867).

<sup>3</sup> Cox's *Walpole* (*Pownall's Pap.*), v. 3, p. 616.



Third, the reigning sovereign has always, and especially when the Privy Council was a numerous body, selected, and by his prerogative had a right to select, certain persons of that council, in whom he could especially confide, and by whose advice he more particularly acted. So that it may be said that at no period has the king of England been without sworn advisers who could be held responsible for all his public acts. Fourth, the authority and jurisdiction of the Privy Council have been made from time to time the subject of parliamentary regulation; but the difficulty of enforcing the responsibility of ministers to parliament under prerogative government was such that, except in case of high crimes and misdemeanours, which could be punished by impeachment, it was virtually inoperative. Fifth, the want of a cordial understanding between the sovereign and the legislative assemblies was the fruitful source of dissension and misgovernment, which led, in 1649, to the overthrow of the monarchy, and in 1688 to the transference of the crown to a prince of the House of Orange, who was "called in to vindicate practically those maxims of liberty for which, in good and evil days, England had contended through so many centuries."<sup>1</sup> And, lastly, the attempt under the Commonwealth to establish a Council of State which should reflect the opinions of the House of Commons, and be composed of the most prominent and influential members of that body, however promising at the outset, speedily and entirely failed, from the lack of that element of stability which the authority and influence of a constitutional monarch can alone<sup>2</sup> supply.

It is also noticeable that, even during the reign of the Tudor sovereigns, when the power of the crown was pre-dominant over everything, and parliament was weak and subservient, principles were at work which ultimately tended to the further advancement of constitutional government. It was then that the great offices of state began first to assume form and method, and the complex

Growth of  
constitutional  
govt. agent.

<sup>1</sup> Taylor, *Book of Rights*, p. 211.

<sup>2</sup> I have again left Mr. Todd's text unmodified, but it seems to require modification. Stability can be secured by other forms of government as well as by constitutional monarchy; and stability was wanting during the Commonwealth, because the institutions of the country were unsettled and uncertain.—*Editor*.

machinery of administration to settle into something like its modern aspect. The Secretaries of State, originally mere clerks appointed to do the king's bidding, became by degrees potent functionaries, with certain defined powers and responsibilities. The office of Chancellor, too, was at this period brought nearly to its present shape. That of Lord High Treasurer, or First Commissioner of the Treasury, and that of Lord High Admiral, or First Commissioner of the Admiralty, came to be then of fixed appointment and establishment. Thus, instead of the arbitrary and irregular selection of early times, the principal officers of state were duly appointed to discharge the functions of administration, and to advise the sovereign in the government of the realm. The persons appointed by the king to fill these posts, if not already of the Privy Council, were invariably added to that dignified assembly; and, as the most trusted servants and advisers of the crown, they formed the nucleus of the confidential council, which was afterwards known as "the Cabinet." This powerful governing body, heretofore a pliant instrument in the hands of the reigning monarch, was made responsible to parliament by the revolution of 1688. The Bill of Rights, while it left unimpaired the just rights and privileges of the crown, rebuked the excessive claims of prerogative, redressed the grievances of the people, gave vigour and certainty to the efforts of parliament, secured its independence, and recognized its inquisitorial functions, so that henceforth it was free to assume that watchful oversight and control over the administration of public affairs, which is now acknowledged to be its peculiar and most important vocation.<sup>1</sup>

The Cabinet made responsible to parliament.

<sup>1</sup> See Mr. Adam's speech, *Parl. Deb.* v. 16, pp. 2 \* \* \* \* -7 \* \* \* \*.

## CHAPTER III.

THE ORIGIN AND PROGRESS OF PARLIAMENTARY  
GOVERNMENT.

IN the endeavour to enforce the principle of ministerial responsibility for all acts of government, it speedily became apparent that some constitutional provision was necessary to require that the advisers of the crown, through whose agency all affairs of state are conducted, should be publicly known—in order that they might be held accountable to Parliament for the advice they had given to the sovereign, and for the consequences of acts which had been brought about through their own instrumentality. This was strikingly exemplified in the case of the Partition Treaties, which occurred in 1698. The House of Commons were of opinion that these treaties were highly injurious to the public interests, and it was proposed to impeach Lord Somers, who, as Chancellor, had affixed to them the great seal. Somers, in his defence, alleged that he had opposed the treaties, but that he had put the great seal to one of them by the king's command, considering that he was bound to do so. Dissatisfied with this explanation, the commons resolved upon his impeachment. They also determined to impeach Lord Portland, Lord Orford, and Lord Halifax, who, as prominent members of the administration, were held responsible for advising this objectionable measure. But it proved that these noblemen had had nothing to do with the matter, and that the treaties had been negotiated by the king himself. Lord Somers was acquitted by the House of Lords, notwithstanding the unwarrantable nature of his defence, in trusting for the justification of his conduct to the king's command; an excuse which was entirely at variance with the true principles of responsible government, and which, if recognized as sufficient, would

Case of the  
Partition  
Treaties.

deprive parliament of all control over the executive administration.

The proceedings against the other members of the ministry were equally unsuccessful, it being impossible to prove that they had been parties to the obnoxious treaty.<sup>1</sup> Foiled in their attempt to bring home to any one responsibility for this act of arbitrary power, the House of Commons set about the adoption of measures to prevent a repetition of the offence. This they endeavoured to effect by the introduction of a clause into the Act of Settlement which provided that, after the accession of the House of Hanover, "all matters relating to the well-governing of this kingdom, which are properly cognizable in the Privy Council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon shall be signed

Responsibility  
of Privy  
Councillors.

by such of the Privy Council as shall advise or consent to the same."<sup>2</sup> This provision was meant to compel the discussion of all state affairs in full Privy Council, and to discriminate between the responsibility of those who promoted and those who opposed each resolution, by requiring all who voted for it to sign their names thereto. It was, however, soon perceived that such a system would cause infinite delay and embarrassment in governing the kingdom; while doubtless it was also obnoxious to the ministry, who were not as yet prepared to assume such a definite responsibility, involving with it prospective anticipations of impeachment and disgrace.<sup>3</sup> Accordingly, in the following reign, before the time when it was to have come into operation, it was formally repealed.<sup>4</sup>

Another clause in the Act of Settlement—which appears to have been framed in connection with the foregoing—declared that no pardon under the great seal should be pleadable to an impeachment by the commons. This salutary provision still remains in force, and is calculated to increase the sense of individual responsibility of ministers. It has been interpreted by Blackstone as designed to prevent the royal pardon from being available pending an impeach-

Impeachment  
of ministers.

<sup>1</sup> Hallam's *Const. Hist.* v. 3, p. 253; Campbell's *Chanc.* v. 4, pp. 156-158.

<sup>2</sup> 12 & 13 Will. III. c. 2, § 4.

<sup>3</sup> Creasy, *Eng. Const.* p. 332; *Parl. Hist.* v. 6, p. 474.

<sup>4</sup> 4 & 5 Anne, c. 8.

ment, and in bar to its progress ; but not to restrain a pardon after the conclusion of the trial.<sup>1</sup>

Although the Act of Settlement proved abortive to ensure the direct accountability of the advisers of the crown to parliament, yet that result was gradually brought about by the course of events, in a way that was quite unforeseen by the politicians and statesmen who effected the revolution.

William III. had been summoned to the throne of England by the two Houses of Parliament, in order that he might rule as a constitutional sovereign. The rights and liberties of the subject, for infringing which King James had forfeited his crown, had been declared by parliament in a document which was presented to the Prince of Orange upon his assumption of the government. They had afterwards been embodied in the Bill of Rights, as part of the fundamental laws of the kingdom, and the motive and condition of the revolution-settlement. The king, on his own part, was sincere in his resolve and endeavour to discharge his sacred obligations with fidelity. But owing to the natural reserve of his disposition, and his large capacity for administration, he relied much less upon the advice of his ministers than would now be expected of a constitutional king. In fact, according to the testimony of Hallam, William was eminently his own minister, and was better fitted for that office than any of those who served him.<sup>2</sup> In all domestic matters, as a general rule, he was wont to consult his ministers,<sup>3</sup> and to govern through their instrumentality. Questions of war and diplomacy, however, the king reserved to himself ; and his advisers, conscious that they were less versed in military and foreign affairs than their royal master, were content to leave with him the command of the army, and to know only what he thought fit to communicate about the instructions which he gave his own ambassadors, or concerning the conferences which he held with the ambassadors of foreign princes.<sup>4</sup> We have seen the consequences of this policy in diplomatic affairs in the matter of the Partition Treaties ; but so deep-seated was the conviction that military affairs were a branch of the prerogative that belonged exclusively to the king himself, that it was

<sup>1</sup> *Step. Com. Ed.* 1874, v. 4, p. 471.

<sup>2</sup> Hallam, *Const. Hist.* v. 3, pp. 252, 388.

<sup>3</sup> Macaulay, v. 3, p. 538.

<sup>4</sup> *Id.* v. 5, p. 123.

not until the year 1806 that it was fully conceded that the management of the army, in common with all other prerogatives, was subject to the supervision of ministers.<sup>1</sup>

To William III., however, is due the credit of the formation of the first administration avowedly constructed upon the basis of party, in order that it might carry on the king's government in conformity with the general political views of the majority of the House of Commons. This ministry was composed of statesmen who had seats in one or other of the Houses of Parliament; thereby supplying a defect in the scheme of government, the want of which in the plan propounded in the Act of Settlement was sufficient to account for the failure of that projected reform. The history of this remarkable transaction, which constitutes such a memorable epoch in our political annals, is reserved for another chapter, in which it is proposed to treat, with more detail, of the origin and development of the cabinet council. Suffice it here to state, that during this reign the distinction between the Cabinet and the Privy Council,—and the exclusion of the latter from deliberation upon all affairs of state, except of the most formal description—was fully established, and that the king's ministers in parliament became the authorized representatives of the crown, for the purpose of introducing, explaining, and defending the measures of government; thereby practically asserting a constitutional principle, which it was reserved for another generation to bring to maturity, that ministers are responsible to parliament for every act of the crown in the conduct of public affairs.

Henceforward (to use the words of May) a succession of monarchs arose, less capable than William, and of ministers gifted with extraordinary ability and force of character, who rapidly reduced to practice the theory of ministerial responsibility. Under the sovereigns of the house of Hanover, the government of the state was conducted throughout all its departments by ministers responsible to parliament for every act of their administration, without whose advice no act could be done, who could be dismissed for incapacity or failure, and impeached for political crimes; and who resigned when their advice was disregarded by the crown or their policy disapproved by parliament. With ministers

<sup>1</sup> See *post*, p. 64.



thus responsible, "the king could do no wrong." The Stuarts had strained prerogative so far that it had twice snapped asunder in their hands. They had exercised it personally, and were held personally responsible for its exercise. One had paid the penalty with his head; another with his crown; and their family had been proscribed for ever. But now, if the prerogative was strained, the ministers were condemned, and not the king. If the people cried out against the government, instead of a revolution there was merely a change of ministry. Instead of dangerous conflicts between the crown and the parliament, there succeeded struggles between rival parties for parliamentary majorities; and the successful party wielded all the power of the state. Upon ministers, therefore, devolved the entire burthen of public affairs; they relieved the crown of its cares and perils, but, at the same time, they appropriated nearly all its authority. The king reigned, but his ministers governed.<sup>1</sup>

Making use of their undoubted prerogative of selecting their own ministers, it had been customary for the sovereigns of England, anterior to the Revolution, to choose men to fill the high offices of state upon personal grounds, without regard to their general agreement upon political questions. Party as well as parliamentary government originated with William III., who, in 1696, constructed his first parliamentary ministry upon an exclusively Whig basis. But the idea was unhappily abandoned by the king in his subsequent administrations, and it was not until the House of Hanover ascended the throne that ministers were, as a general rule, exclusively selected from amongst those who were of the same political creed, or who were willing to fight under the same political banner. Queen Anne was inclined to favour the Tories, and in 1710 she authorized the appointment of a decidedly Tory ministry: upon the accession of George I., however, the Whig party obtained possession of the government, and continued for a long time to maintain the upper hand, compelling the king to sacrifice his personal inclinations in favour of their party leaders.<sup>2</sup>

The reigns of the first three Georges were characterized by

<sup>1</sup> May, *Const. Hist.* v. 1, pp. 5, 6.

<sup>2</sup> *Ib.* p. 7.

the strife of rival factions to obtain possession of office, and to coerce the sovereign, by the united influence of the great families, to choose his ministers exclusively from amongst themselves. George I. and his successor succumbed to the necessity of conciliating the aristocracy, who by their wealth and territorial possessions had obtained supremacy in the councils of parliament. But subjection to Whig control in any shape was peculiarly irksome to George III. Accordingly, when he succeeded to the throne he immediately endeavoured "to loosen the ties of party, and to break down the confederacy of the great Whig families. His desire was to undertake personally the chief administration of public affairs, to direct the policy of his ministers, and himself to distribute the patronage of the crown. He was ambitious not only to reign, but to govern. His will was strong and resolute, his courage high, and his talent for intrigue considerable. He came to the throne determined to exalt the kingly office; and throughout his long reign he never lost sight of that object."<sup>1</sup> The constant aim of the king was to be, in effect, his own minister. "When ministers not of his own choice were in office, he plotted against them and overthrew them; and, when he had succeeded in establishing his friends in office, he enforced upon them the adoption of his own policy. . . . That he was too fond of power for a constitutional monarch, none will now be found to deny; that he sometimes resorted to crafty expedients, unworthy of a king, even his admirers must admit. With a narrow understanding and obstinate prejudices, he was yet patriotic in his feelings, and laboured earnestly and honestly for the good government of his country. If he loved power, he did not shrink from its cares and toil. If he delighted in being the active ruler of his people, he devoted himself to affairs of state even more laboriously than his ministers. If he was jealous of the authority of the crown, he was not less jealous of the honour and greatness of his people. A just recognition of the personal merits of the king himself enables us to judge more freely of the constitutional tendency and results of his policy."<sup>2</sup>

The foregoing description of George III. is taken from the first chapter of May's *Constitutional History*. It vividly portrays the chief points in the character of that monarch,

<sup>1</sup> May, *Const. Hist.* v. 1, p. 10.

<sup>2</sup> *Ib.* pp. 13, 14.

upon whom such various judgments have been passed. By some he is regarded as the model of a "patriot king," whilst others point him out as a bigoted, selfish monarch, obstinate, and wholly regardless of constitutional rights when opposed to his own policy or prejudices. But, whatever opinion we may entertain of his personal character, we have no right to judge his proceedings by the strict rule of parliamentary government; for that system was still in its infancy when George III. was king, and the usages of the constitution in that day warranted a more direct and extended interference in the details of government by the occupant of the throne than would now be deemed justifiable or expedient.

George III., during at least the earlier part of his reign, was in the frequent habit of conferring secretly upon public affairs with noblemen and others who were not members of the Cabinet, but who were personally devoted to the king, and willing to aid him in carrying out his own peculiar views. His object in this was evidently to create a new party, faithful to himself, and dependent entirely upon his will. He succeeded; and the party came to be known as "the king's men," or "the king's friends." Instead of relying upon the advice of his responsible ministers, the king often took counsel with those whom Burke describes (in his "*Thoughts on the Cause of the Present Discontents*") with some oratorical exaggeration as his "double" or "interior cabinet." His first speech to parliament was not even submitted for the approval of his ministers, but was drawn up, by the king's command, by ex-Chancellor Hardwicke, who, when in office, had had much experience in the preparation of royal speeches, and in whose skill and judgment his Majesty had peculiar confidence. One important paragraph is known to have been written by the king himself, and the whole speech was forced upon the ministry, who consented very reluctantly to adopt it as their own.<sup>1</sup> "This 'influence behind the throne' was denounced by all the leading statesmen of the day—by Mr. Grenville, Lord Chatham, the Marquis of Rockingham, the Duke of Bedford, and Mr. Burke. Occasionally denied, its existence was yet so notorious, and its agency so palpable, that historical writers of all parties, though taking different views of its character, have not failed to acknowledge it. The

<sup>1</sup> Harris, *Life of Hardwicke*, v. 3, p. 231.

bitterness with which it was assailed at the time was due, in great measure, to political jealousies, and to the king's selection of his friends from an unpopular party; but on constitutional grounds it could not be defended."<sup>1</sup> For at least five years after his accession to the throne it has been generally supposed that George III. was more or less guided by Lord Bute, whether in or out of office, as his chief adviser.<sup>2</sup> After the retirement of Lord Bute from his secret counsels, his Majesty was still surrounded by a numerous party of friends, some of whom held office in the government or household, but who severally "looked to the king for instructions instead of to the ministers." "But the greater part of the king's friends were independent members of parliament, whom various motives had attracted to the personal support of the king. They formed a distinct party, but their principles and position were inconsistent with constitutional government. Their services to the king were not even confined to council or political intrigue, but were made use of so as to influence the deliberations of parliament. The existence of this party, and their interference between the king and his responsible advisers, may be traced, with more or less distinctness, throughout the whole of this reign. By their means the king caballed against his ministers, thwarted their measures in parliament, and on more than one occasion effected their overthrow."<sup>3</sup>

By the encouragement which he afforded to these irregular practices, it is undeniable that George III. violated a fundamental principle of the constitution, and hindered the progress of parliamentary government. We are not prepared to assert, however, that in no circumstances whatever is the sovereign justified in seeking advice from others than those who form part of his recognized administration. Every peer <sup>Who may advise the king.</sup> of the realm is an hereditary councillor of the crown, and is entitled to offer advice to the reigning monarch. The king, moreover, is at liberty to summon whom he will to his Privy Council; and every privy councillor has in the eye of the law an equal right to confer with the sovereign upon

<sup>1</sup> May's *Hist.* v. 1, pp. 11, 12.

<sup>2</sup> *Ib.* pp. 22, 27, 30; *Parl. Deb.* v. 16, p. 9. See *Ed. Rev.* v. 126, p. 14; *Greville Memoirs*, v. 1, p. 84.

<sup>3</sup> May, *Const. Hist.* v. 1, pp. 31, 47, 57, 79, 84, 88, 98; Massey, *Geo. III.* v. 1, pp. 67, 144, 242.

matters of public policy. The position and privileges of cabinet ministers are, in fact, derived from their being sworn members of the Privy Council. It is true that by the usages of the constitution cabinet ministers are alone empowered to advise upon affairs of state, and that they alone are ordinarily held responsible to their sovereign and to Parliament for the government of the country. Yet it is quite conceivable that circumstances might arise which would render it expedient for the king, in the interests of the constitution itself, to seek for aid and counsel apart from his cabinet. Such an occasion, it may be urged, was found in the events which led to the dismissal of the Coalition ministry of Fox and North in 1783. It will be remembered that the bill for the government of India, which had been drawn up by Mr. Fox, had been formally sanctioned by his Majesty, and passed triumphantly by the influence of the ministry through the House of Commons, before the true character of the measure was understood, either by the sovereign or by the country at large. The eyes of the king were opened to the real scope and tendency of the bill by ex-Chancellor Thurlow, who availed himself of his privilege as a peer to obtain access to the king, and to advise him what course he should pursue at this juncture. As soon as the bill reached the Upper House, George III. authorized Lord Temple, one of his "friends," to oppose it, and even to use his name to defeat it in that chamber. Succeeding in this, the king then dismissed his ministers, and empowered Mr. Pitt to form a new administration. In taking office, Mr. Pitt, as he was constitutionally bound to do, justified to the country the removal of his predecessors, and assumed entire responsibility for the change.<sup>1</sup> Thus the authority of the sovereign

Dismissal of  
the Coalition  
ministry in  
1783.

<sup>1</sup> See Stanhope's *Life of Pitt*, v. 1, pp. 153-155; Massey's *George III.* v. 3, p. 224. See also Ld. Campbell's account of these transactions, in his *Lives of the Chanc.* v. 5, p. 565. This sound constitutional lawyer does not hesitate to express his approval of the king's conduct in this emergency. [Notwithstanding Lord Campbell's authority, the course which George III. took on this occasion was irregular. It is the king's duty to act on the advice of his responsible ministers, and, so long as they retain office, to refrain from opposing, directly or indirectly, the measures which they introduce. In the present day, no monarch would even venture on parting with a ministry which retained the confidence of the House of Commons. The dismissal of the Melbourne ministry in 1834 was the last, and will probably remain the last, example of such an exercise of the prerogative.



was rescued from the meshes of political intrigue in which it had become involved; partly by the machinations of the ambitious men who had then the upper hand, and partly by reason of the king's own irregular acts; and the chariot of the state proceeded once more along the beaten tracks, duly subjected to constitutional control.

The position of Mr. Pitt, on accepting office, was one of peculiar difficulty. He had to contend almost <sup>Mr. Pitt's</sup> single-handed against an overwhelming majority <sup>administration.</sup> of the House of Commons, marshalled by Fox, North, Sheridan, and other able politicians, who were indefatigable in their endeavours to effect his overthrow. But he resolutely determined to maintain his ground as the king's minister, and to abstain from a dissolution of parliament, though this was repeatedly urged upon him by his Majesty, until he could be satisfied that there was a decided reaction in the country in his favour, indications of the commencement of which began to be speedily manifested. He therefore boldly continued the struggle from December 22 to March 24, notwithstanding reiterated votes of want of confidence and every hindrance (short of an actual refusing of the supplies) that the ingenuity of his opponents could devise.

The private letters of the king to Mr. Pitt, at this period, show us the light in which his Majesty regarded <sup>The king's</sup> the conduct of the House of Commons towards <sup>views of his</sup> the minister of his choice. Writing to Mr. Pitt <sup>ministry.</sup> shortly before the dissolution of parliament, the king says, "he [Mr. Pitt] will ever be able to reflect with satisfaction that, in having supported me, he has saved the constitution, the most perfect of human formation."<sup>1</sup> And, on another occasion, the king refers to his own course as "calculated to prevent one branch of the legislature from annihilating the other two, and seizing also the executive power."<sup>2</sup> In fact, in Mr. Pitt, George III. found a minister after his own heart, of high ability, unswerving integrity, and firmness of purpose. Never-

But George III. went beyond this, in retaining in office a ministry whose measures he was thwarting. The fact that the country ultimately adopted the views of the sovereign should not blind the student to the true constitutional objections to the sovereign's conduct.—*Editor.*]

<sup>1</sup> Tomline's *Life of Pitt*, v. 1, p. 321.

<sup>2</sup> *Ib.* p. 293.



theless, the king never surrendered, even to his favourite minister, the unrestricted exercise of the prerogative, but himself shaped the general policy of his government, and personally influenced the distribution of patronage, both in Church and State.<sup>1</sup>

After the death of Mr. Pitt, in 1806, the king was obliged to accept an administration taken chiefly from the Fox and Grenville ministry. Whig party, in whom he had no confidence. The ministry of "All the Talents," under the presidency of Lord Grenville and Mr. Fox, was forced, by political considerations, upon him. Before the arrangements were completed, a difficulty arose on a point of prerogative. During the negotiations, "Lord Grenville proposed to his Majesty some changes in the administration of the army; by which the question was raised whether the army should be under the immediate control of the crown, through the commander-in-chief, or be subject to the supervision of ministers. The king at once contended that the management of the army rested with the crown alone; and that he could not permit his ministers to interfere with it, beyond the levying of the troops, their pay and clothing. Lord Grenville was startled at such a doctrine, which he conceived to be entirely unconstitutional, and to which he would have refused to submit. For some time it was believed that the pending ministerial arrangements would be broken off; but on the following day Lord Grenville presented a minute to his Majesty, stating that no changes in the management of the army should be effected without his Majesty's approbation." With this proviso the king assented to the ministerial claims; and thus the sole remaining branch of the public service, heretofore considered as to a certain extent exempted from such interference, was brought under ministerial control.<sup>2</sup>

Lord Grenville's ministry was of very brief duration. The death of Mr. Fox, which speedily followed that of his great

<sup>1</sup> May's *Hist.* v. 1, pp. 75, 85.

<sup>2</sup> *Ib.* p. 87, quoting *Ann. Reg.* 1806, p. 26; Lewis, *Admin.* p. 287. [The inference that Mr. Todd draws here is hardly accurate. There can be no doubt that George III., for the first thirty years of his reign, claimed and exercised an irresponsible authority over the management and patronage of the army; and an arrangement, which settled that no changes should be introduced into its management without his Majesty's approbation, virtually conceded the claim which the king made.—*Editor.*]

rival, led to several changes in the cabinet, and the following year a difficulty occurred between the king and his ministry, which led to their dismissal.<sup>1</sup>

Quarrel  
between the  
king and his  
ministers.

The point at issue arose out of an attempt on the part of ministers to induce the king to agree to a Bill to remove certain disabilities under which Roman Catholics were lying. But the king resisted the proposal, and ministers withdrew their Bill. Whereupon the king demanded of them a pledge that they would not again propose any similar measure. This they refused to give, and were accordingly dismissed from office.<sup>2</sup> This question will hereafter engage our attention, when the relations between a constitutional sovereign and his responsible advisers are discussed. Meanwhile it is worthy of remark, that May, in reviewing this transaction, condemns alike the conduct of ministers in their hasty and unauthorized minute, and the conduct of the king in endeavouring to exact a pledge from his cabinet that they would never again obtrude their advice upon him in regard to the Roman Catholic claims. He also distinctly asserts that the incoming ministers were responsible for the conduct of the king concerning the pledge, as though they had themselves advised it.<sup>3</sup>

From this time until the close of the reign of George III. no further question arose which affects the history of ministerial responsibility. The king's "own power, confided to the Tory ministers who were henceforth admitted to his councils, was supreme. Though there was still a party of 'the king's friends,' his Majesty agreed too well with his ministers, in principles and policy, to require the aid of irresponsible advisers."<sup>4</sup> The personal influence of the king was, indeed, very considerable throughout the whole of his reign, and was a great source of strength to such ministers as enjoyed his favour. It was, on the contrary,

Personal  
influence of  
George III.

<sup>1</sup> *Hans. D.* March 26, 1807.    <sup>2</sup> *National Rev.* v. 14, p. 388.

<sup>3</sup> May, *Const. Hist.* v. 1, pp. 96, 97. [May's words are, "No constitutional writer would now be found to defend the pledge itself, or to maintain that the ministers who accepted office in consequence of the refusal of that pledge had not taken upon themselves the same responsibility as if they had advised it." But this was not the view of the incoming ministers. Mr. Perceval declared that the king had acted without advice. —*Editor.*]

<sup>4</sup> *Ib.* p. 98.

a continual cause of difficulty to ministers who were so unfortunate as to incur his disapprobation.<sup>1</sup>

In reviewing the history of this reign, we cannot fail to notice the ease with which the successive administrations who held office were able to control the House of Commons, and to carry on the government in connection therewith. This was mainly attributable, no doubt, to the number of seats in that house which were virtually in the nomination of the crown, or in the hands of the leading aristocratic families, from amongst whom the members of the cabinet were, at that time, exclusively chosen.

The great governing families of England have always been divided in their political opinions. Had they been of one mind, their influence would have been irresistible. As it was, the Whigs and Tories were continually struggling for the mastery. Sometimes the heart of the nation would incline to favour the traditions of the monarchy, embodied in the Tory creed; again, the ideas of progress which were the battle-cry of the Whigs would be in the ascendant. George III., as we have seen, was strongly biassed on behalf of the Tory party; and no wonder: for the "great Tory peers and patrons of boroughs, who, by their influence in counties and their direct power of nomination, commanded the votes of a large section of the House of Commons, were willing, in general, to support any ministry which the king appointed, and to permit all the influence of the crown to be exercised in its favour, provided that their own personal wishes respecting the distribution of patronage received due attention. They contented themselves, as politicians, with a barter of power for patronage; they gave the former and received the latter. The great Whig lords, however, made a harder bargain with the crown. They insisted upon selecting the king's ministers before they consented to support them. They required that an administration should be formed of members of their own party, whose names should be proposed by their own leaders."<sup>2</sup>

Between the oligarchies of the two great parties, says Sir G. C. Lewis, "there was this great difference that, whereas the

<sup>1</sup> Sir G. C. Lewis, *Adminis. of Gt. Brit.* p. 420.

<sup>2</sup> *Ib.* p. 88; Fitzmaurice, *Life of Ld. Shelburne*, v. 3, pp. 223, 238, 501.

Tories submitted themselves absolutely to the will of the king, the Whigs gave him only a conditional support ; they insisted on his government acting upon their political principles, and being formed of persons who would carry those principles into effect, though they might be unpalatable to the crown." The king "chafed at the oligarchy of the Whig houses, because the Whigs put a bit in his mouth ; whereas the Tory party was a quiet beast of burden, which he could ride or drive as he pleased. The real contest in those days was, not between aristocracy and democracy, but between aristocracy and monarchy." The plan of reform advocated by Mr. Pitt, in 1780, was mainly directed to emancipate parliament from the influence of the crown, exercised through the nomination boroughs, and to prevent the king from bartering patronage for seats. He sought thus to diminish the influence of the crown, which, in the words of Dunning's famous resolution of April 6, 1780, "had increased, is increasing, and ought to be diminished." But ere long this desirable object was attained by other means. The labours of Edmund Burke in the cause of economic reform, the abolition of sinecure offices, and the reduction of the pension list within reasonable limits, sufficed to curtail the excessive and unwarrantable abuse of crown patronage. For this reason, principally, Mr. Pitt refrained from any further advocacy of parliamentary reform. When the question was revived by Lord John Russell, after the Peace, and made a ministerial question by the Grey administration, it had entirely changed its aspect. "The influence of the crown was no longer formidable ; and the measure of 1831 was aimed at the diminution of the power of the aristocratic proprietors of close boroughs, by the same means which Pitt proposed to employ to diminish the power of the crown."<sup>1</sup>

Mr. Pitt's  
plan of  
parliamentary  
reform.

George IV., when Prince of Wales, had been the bosom friend of Fox and Sheridan, and it was supposed that upon his accession to the throne he would promote the Whigs to place and power. But when, in 1811, during the incapacity of his father, he became prince regent, he evinced a remarkable and increasing indifference to the principles and persons of the Whig leaders. After the death of the old king—on January 29, 1820—he made no change in

Character of  
George IV.

<sup>1</sup> Lewis, *Adminis.* pp. 91-99.

his policy, but continued to repose confidence in the ministers of whom his father had approved. So that, during the whole of his reign (1820-1830), the Tories maintained their ascendancy in the cabinet and in the legislature. Indifferent to the exercise of political power, and chiefly concerned in gratifying his taste for pomp and luxury, George IV. rarely attempted to interfere with his ministers, except in matters personally affecting himself, or some of the royal family, when he could be very resolute and determined.<sup>1</sup> So far as general politics were concerned, he usually acquiesced in the views of his constitutional advisers, and co-operated with them in their measures for the public good. In fact, he appears to have taken a lively interest in the progress of state affairs, judging from the active correspondence he kept up with his ministers.<sup>2</sup> From defects of personal character, the regal influence of George IV. was limited to the strict exercise of the prerogative; and his personal influence was so small, that it was even difficult for his ministers to bear the weight of his unpopularity, and to uphold the respect due to the crown, when it encircled the head of such an unworthy sovereign.<sup>3</sup> On one point of public policy, however, he attempted to make a stand, in behalf of his own sense of right, namely, upon the question of further concession to the Roman Catholic claims, but ministers were firm, and obliged him to give way. For George IV. had not his father's spirit, and could not persevere in opposing an act which he nevertheless considered to be contrary to the coronation oath, and a dereliction of his duty as a Protestant king.

The domestic relations of George IV. were, it is well known, extremely unhappy; and they led, in 1820, to serious difficulties between the king and his ministers, which threatened to terminate in an open rupture, a catastrophe which was only averted by the patience and good sense of ministers themselves. Some account of these events will afford a valuable illustration of the ministerial *status* during this reign. The queen having, when Princess of Wales, disgraced herself by levity of conduct, and

<sup>1</sup> Campbell's *Chanc.* v. 7, pp. 345, 346. See *Welln. Desp.* 3rd ser. v. 4, p. 665, and v. 6, p. 293.

<sup>2</sup> See Stapleton's *Canning and his Times*, pp. 416, 437, 445; *Welln. Desp.* 3rd ser. *passim*.

<sup>3</sup> Lewis, *Adminis.* p. 421.



exposed herself to the charge of adulterous practices, the king desired the premier to prepare, without delay, a bill of divorce against her. He also determined if possible to proceed against his unhappy consort for high treason. The cabinet, however, were not in favour of such severe measures. In a minute dated February 10, 1820, ministers communicated to the king their opinion, individually as well as collectively, that a proceeding against the queen for high treason was out of the question; and that to attempt to procure a divorce might seriously prejudice the interests of the crown and of the monarchy, inasmuch as, bearing in mind the king's own conduct, it would be impossible to establish a case sufficient to justify the grant of a divorce by Act of Parliament. They agreed, however, to propose certain measures to prevent personal annoyance to his Majesty by the return of the queen to England, and were willing to justify the king in omitting her name from the Liturgy, and refusing to allow her to be crowned. The king replied to this memorandum at considerable length, reiterating his objections. On February 14, the cabinet re-stated to the king their unanimous opinion that, whatever other measures they might agree to propose, they could not recommend the introduction of a Bill of Divorce. The king was angry, and peremptorily reiterated his commands. Whereupon his ministers, finding expostulation fruitless, threatened to resign. No other men could be found to take their place, on condition of performing what they had refused to do; accordingly the king, sorely against his will, yielded, being "ready, for the sake of decorum and the public interest, to make this great and this painful sacrifice of his personal feelings."<sup>1</sup>

A few weeks afterwards we learn, through a private letter from Lord Chancellor Eldon to his daughter, that the king "has been pretty well disposed to part with us all, because we would not make additions to his revenue."<sup>2</sup> Upon these transactions a recent historian justly remarks, "These minor troubles have a happy capacity for adjustment in a constitutional monarchy, when responsible ministers possess the

<sup>1</sup> See the correspondence between the king and his ministers on this subject in Yonge, *Life of Ed. Liverpool*, v. 3, cc. xxiv., xxv.; Lewis, *Adminis.* pp. 356-411; Torrens, *Life of Melbourne*, v. 1, p. 145.

<sup>2</sup> Twiss, *Life of Eldon*, v. 2, p. 362.



requisite degree of firmness."<sup>1</sup> The king was well aware that he could not ask his advisers to advocate any measures affecting himself individually, but such as they could properly submit for the sanction of parliament, upon their own personal responsibility; and that, had he taken upon himself, in such circumstances, to dismiss his ministry for refusing to be subservient to his wishes, he would have found it difficult, if not impossible, to induce any one to take their places, and assume the responsibility of his act. Notwithstanding the criminatory evidence obtained against the princess in 1806, and again in 1819, ministers determined to take no active measures against her unless she should obtrude herself upon public notice by demanding to be regarded as Queen of England. She imprudently decided upon this course, and in the summer of 1820 left the continent, where she had been residing for several years, and made her appearance in London, for the purpose of prosecuting her claims. On the day of her arrival in London, a message from the king was presented to both Houses, communicating certain papers respecting the conduct of her Majesty since her departure from the kingdom, and recommending them to the immediate and serious attention of parliament. In the House of Lords, on the motion of Lord Liverpool (the prime minister), these papers were referred to a committee of secrecy, upon whose report a Bill of Pains and Penalties for the degradation of the queen, and for her divorce from her husband, was introduced by his lordship. After evidence taken at the bar, the second reading of this Bill was carried by a majority of 28. In committee a motion was made to expunge the divorce clause, which, though unsuccessful, was supported by all the ministers present, nine in number. By this proceeding they preserved their consistency, and maintained their independence of the personal influence of the king.<sup>2</sup> On November 10, the third reading of the Bill was carried by a majority of nine only; whereupon Lord Liverpool announced that the measure would be abandoned. In the

<sup>1</sup> Knight's *Hist. of Eng.* v. 8, p. 165.

<sup>2</sup> [Mr. Todd has misunderstood the reason for this famous vote. Ministers desired to expunge the divorce clause, because they saw that it would be impracticable to carry the Bill while it remained part of it. Their policy in this respect turned on questions of expediency, and was certainly not marked by consistency.—*Editor.*]

state of excitement which prevailed throughout the country on the question, and the feeling which existed against the king, the attempt to carry the Bill through the House of Commons, after such a close division in the Lords, would have been most disastrous, and would probably have resulted in the overthrow of the administration, whose popularity had been already diminished by the degree of assistance they had rendered to the king on this occasion.

The reign of William IV. has been rendered memorable by the passing of the Reform Bill; a measure to which the king was at first opposed, but which was ultimately carried through parliament with a high hand by his own personal exertions. Impressed with the necessity of Reform, to save the country from revolution, and to avert the perils anticipated by the defeat of the Bill in the House of Lords, the ministry extorted from the king a pledge to create a sufficient number of peers to turn the scale in favour of Reform; but a dread of the consequences of such an arbitrary proceeding induced the king, with the knowledge and consent of his ministers, to cause a circular letter to be addressed to the Opposition peers, urging upon them to drop all further resistance to the Bill, so that it might pass without delay, and as nearly as possible without alteration.<sup>1</sup>

1830-1837.

William IV.  
and the  
Reform Bill.

The Reform Bill became law, through the active interposition of the crown, and with the reluctant assent of the House of Lords. It has effected an important revolution in the English political system. Professedly based upon a "careful adherence to the acknowledged principles of the constitution, by which the prerogatives of the crown, the authority of both Houses of Parliament, and the rights and liberties of the people, are equally secured,"<sup>2</sup> it has contributed, in its consequences, to increase the power of the House of Commons, not only by lessening the aristocratic influence of the proprietors of close boroughs, but also by diminishing the strength of the crown in that assembly. Two years after its passage, the prerogatives of the crown were again called into activity, in a manner which seemed to revive the political

Effects of the  
Reform Bill.

<sup>1</sup> Roebuck's *Hist. of the Whig Ministry*, v. 2. pp. 331, 334.

<sup>2</sup> The king's speech at the opening of Parliament, in June, 1831; and see Lord Russell's comments thereon, in his *Eng. Const.* p. 52.

history of 1784. Lord Grey's government had lost the confidence of the king. The retirement of several members of the cabinet on the question of the appropriation of the surplus revenues of the Church of Ireland excited the apprehension of the king as to the safety of the Irish Church, and, without consulting his ministers, he gave public expression to his alarm, in replying to an address of the prelates and clergy of Ireland. "The ministry, enfeebled by the loss of their colleagues, by disunion and other embarrassments, soon afterwards resigned; notwithstanding that they continued to command a large majority in the House of Commons. They were succeeded by Lord Melbourne's administration, which differed little in material politics and parliamentary strength. But this administration was distasteful to the king, who had meantime become a convert to the political opinions of the Opposition."<sup>1</sup>

Dismissal of  
his ministers  
by William IV.  
in 1834.

Taking advantage of the removal of Lord Althorp from the leadership of the House of Commons, and from the office of Chancellor of the Exchequer, owing to his accession to a peerage by the death of his father, the king suddenly dismissed his ministers, and consulted the Duke of Wellington upon the formation of a government from the Tory party, who were in a decided minority in the House of Commons. The propriety of this act has been questioned by May, for the reason that "all the usual grounds for dismissing a ministry were wanting. There was no immediate difference of opinion between them and the king upon any measure or question of public policy; there was no disunion among themselves, nor were there any indications that they had lost the confidence of parliament. But the accidental removal of a single minister—not necessarily even from the government, but only from one house of parliament to the other—was made the occasion for dismissing the entire administration. It is true that the king viewed with apprehension the policy of his ministers in regard to the Irish Church; but his assent was not then required to any specific measure of which he disapproved, nor was this ground assigned for their dismissal. The right of the king to dismiss his ministers was unquestionable; but constitutional usage has prescribed certain conditions under which this right should be

<sup>1</sup> May, *Const. Hist.* v. 1, p. 120.

exercised. It should be exercised solely in the interests of the state, and on grounds which can be justified to parliament—to whom, as well as to the king, the ministers are responsible. But here it was not directly alleged that the ministers had lost the confidence of the king: and so little could it be affirmed that they had lost the confidence of parliament that an immediate dissolution was counselled by the new administration. The act of the king bore too much the impress of his personal will and too little of those reasons of state policy by which it should have been prompted; but its impolicy was so signal as to throw into the shade its unconstitutional character."<sup>1</sup>

The Duke of Wellington advised that the formation of the new administration should be entrusted to Sir Robert Peel; and, as that statesman was abroad Ministry of Sir R. Peel, in 1834. at the time, he himself accepted the office of first Lord of the Treasury, together with the seals of office as Secretary of State, which, there being no other secretary constituted his grace Secretary for the Home, Foreign, and Colonial Departments.

Upon the arrival of Sir R. Peel, he immediately waited upon the king, and accepted the proffered charge. And "so completely had the theory of ministerial responsibility been now established that, though Sir R. Peel was out of the realm when the late ministers were dismissed—though he could have had no cognisance of the causes which induced the king to dismiss them—though the Duke of Wellington had been invested with the sole government of the country without his knowledge, he yet boldly avowed that, by accepting office after these events, he became constitutionally responsible for them all, as if he had himself advised them."<sup>2</sup> He did not attempt, like the ministers of 1807, to absolve himself from censure for the acts of the crown, and at the same time to denounce the criticism of parliament, as an arraignment of the personal conduct of the king, but manfully accepted the full responsibility which had devolved upon him.<sup>3</sup>

A dissolution of parliament was at once determined upon;

<sup>1</sup> May, *Const. Hist.* v. 1, pp. 122, 123; and see Trevelyan, *Life of Macaulay*, v. 2, p. 54.

<sup>2</sup> *Hans. D.* 3rd ser. v. 26, pp. 216, 223.

<sup>3</sup> May, v. 1, p. 125

its result proved, upon the whole, unfavourable to Sir R. Peel, for, although his own supporters were largely increased, yet a majority against his ministry was returned. For a while he endeavoured, with great tact and consummate ability, to carry on the government, but he was confronted at every turn by a hostile and enraged majority in the House of Commons, and, after several discomfitures, was defeated on a resolution affirming that no measure on the subject of tithes in Ireland could be satisfactory that did not provide for the appropriation of the surplus revenues of the Irish Church. He then resigned, and Lord Melbourne's administration, with some alterations, was reinstated. But it is remarkable that the appropriation of Irish Church property to other uses, which was a favourite project of the Whigs at this time, and the immediate occasion of the change of ministry, was afterwards abandoned, and the resolution of the House of Commons, upon which Sir Robert Peel resigned, remained a dead letter on the Commons' Journals.

Replaced by  
the old Whig  
ministry.

The failure of the efforts of William IV. in favour of the Tory party was complete, and it affords an instructive illustration of the effects of the Reform Act, in diminishing the ascendant influence of the crown. In George III.'s time the dismissal of a ministry by the king, and the transfer of his confidence to their opponents—followed by an appeal to the country—would certainly have secured a majority for the new ministers. Such had been the effect of the dissolutions in 1784 and 1807. But the failure of this attempt to convert parliament from one policy to another by royal prerogative and influence proved that, with the abolition of the nomination boroughs, and the extension of the franchise, the House of Commons had emancipated itself from the control of the crown; and "that the opinion of the people must now be changed before ministers can reckon upon a conversion of the parliament."<sup>1</sup>

Waning  
authority of  
the crown.

Lord Melbourne's ministry continued in office during the rest of the king's reign; and, on the accession of the present queen, in 1837, she confirmed them in their places, and gave them her entire confidence. In 1839, however, they were obliged to resign office, on account of their inability to carry on the government with success. Sir

Reign of Queen  
Victoria.

<sup>1</sup> May, v. 1, p. 127; see also *Ed. Rev.* v. 115, p. 211.

Robert Peel was then charged with the formation of a new ministry. Acting upon the advice of Lord Melbourne, her Majesty was induced, on this occasion, to insist upon retaining the ladies of her household, notwithstanding the change of ministry. This decision of the queen compelled Sir Robert Peel to relinquish the task entrusted to him, and the Melbourne administration were reinstated. But, being defeated upon a vote of want of confidence in the House of Commons in 1841, they again resigned, when Sir R. Peel was sent for, and fully empowered to make such alterations as he thought fit in the composition of the royal household.

"From this time," says May, "no question has arisen concerning the exercise of the prerogatives or influence of the crown which calls for notice. Both have been exercised wisely, justly, and in the true spirit of the constitution. Ministers enjoying the confidence of parliament have never claimed in vain the confidence of the crown. Their measures have not been thwarted by secret influence and irresponsible advice. Their policy has been directed by parliament and public opinion, and not by the will of the sovereign, or the intrigues of the court. Vast as is the power of the crown, it has been exercised through the present reign by the advice of responsible ministers, in a constitutional manner, and for legitimate objects. It has been held in trust, as it were, for the benefit of the people. Hence it has ceased to excite either the jealousy of rival parties or popular discontents."<sup>1</sup>

<sup>1</sup> May, *Const. Hist.* v. 1, p. 135. For the origin of the terms "Conservative" (which has been erroneously attributed to Sir R. Peel) and "Liberal," by which the rival political parties are now designated, instead of being styled Whigs and Tories, as of yore, see *Speeches, etc., of Edward, Lord Lytton*, edited by his son, v. 1, p. lxxix.



## PART II.

### *THE PREROGATIVES OF THE CROWN.*

#### CHAPTER I.

##### THE FUNCTIONS OF THE SOVEREIGN.

THE supreme executive authority of the state in all matters, civil and military, together with jurisdiction and supremacy over all causes and persons ecclesiastical in the realm, belongs to the sovereign<sup>1</sup> of the British Empire, by virtue of his kingly office : for he is the fountain of all state authority, dignity, and honour, and the source of all political jurisdiction therein. He is also the head of the Imperial Legislature, and a component part of every local legislature throughout his dominions. In all that concerns the outward life of the empire, and its relations with other countries or provinces, the sovereign is the visible representative of the state. It is his especial prerogative to declare war and to make peace, and also to contract alliances with foreign nations.

Pre-eminence, perfection, and perpetuity are acknowledged attributes of the crown of England in its political capacity. The crown is hereditary, but in the eye of the law "the king never dies." The decease of a reigning monarch is usually termed his demise; which signifies that, in consequence of the disunion of the king's natural body from his body-politic, the kingdom is transferred

<sup>1</sup> [Mr. Todd uses the word "sovereign" throughout this work in its popular sense as synonymous with king. The sovereignty of the British empire, however, strictly speaking, is not vested in the crown, but in the crown, the lords, and the body of electors who choose the House of Commons.—*Editor.*]

or demised to his successor, and so the royal dignity remains perpetual.<sup>1</sup>

Succession to the crown of England has always been hereditary;<sup>2</sup> but even this right is held subject to limitation and control by the high court of parliament. Formerly the crown went to the next heir; but since the Act of Settlement the inheritance is conditional, being limited to heirs of the body of the Princess Sophia of Hanover, being Protestant members of the Church of England, and married only to Protestants.<sup>3</sup>

After their accession to the throne, the sovereigns of England are consecrated to their high office in the solemnity of a royal coronation at Westminster Abbey. This rite is performed by the Archbishop of Canterbury, assisted by other prelates of the English Church, in the presence of the nobility.<sup>4</sup> A formal coronation is not necessary to the perfection of the king's title to the throne;<sup>5</sup> but by this solemn act the Divine sanction is imparted to the English monarchy, and the whole fabric of our political and social order is strengthened and confirmed:<sup>6</sup> and by the oath taken at their coronation the sovereigns of the United Kingdom acknowledge the supremacy of parliament, and their obligations to govern according to the laws and customs of the kingdom.

From the supreme dignity and pre-eminence of the crown, it naturally follows that the king is personally amenable

<sup>1</sup> Broom's *Leg. Max.* 4th ed. pp. 48, 51.

<sup>2</sup> [Mr. Todd states this too broadly. It was not true, in the strict sense of the words, in Saxon times. And the hereditary principle was set aside on the accession of Henry VII., and still more distinctly after the revolution of 1688. William III., after the death of Mary, was King of England. But he was king by virtue of the choice of parliament, and not by inheritance.—*Editor.*]

<sup>3</sup> 12 & 13 Will. III. c. 2; Martin's *Pr. Consort*, v. 1, p. 57.

<sup>4</sup> See Stubbs, *Const. Hist.* v. 1, p. 144. For the ceremonial itself, see *Chapters on Coronations* (Lond. 1838), c. ix. [See also Ld. Redesdale's observations, *Hans. D.* v. 193, p. 1345; v. 197, p. 71.] The opinions given by the law officers of the crown to George III. on this point, see Yonge, *Life of Ld. Liverpool*, v. 1, p. 44; Sir R. Peel's opinion, *Hans. D.* v. 192, p. 734; and Lord Derby's *Ib.* v. 197, p. 24. For the present form of the sovereign's oath see *Com. Pap.* 1867-8, v. 57, p. 17.

<sup>5</sup> Petersdorff, *New Abridg.* v. 6, p. 214.

<sup>6</sup> See Bagehot, *Eng. Const.* pp. 64, 69.

to no earthly tribunal whatsoever, because all tribunals in the realm are presumed to derive their authority from him, and none are empowered to exercise authority or jurisdiction over him. The royal person, moreover, is by law sacred and inviolable, and the sovereign is personally irresponsible for all acts of government.<sup>1</sup>

But, while the power of the sovereign is supreme in point of jurisdiction, it is neither absolute nor unlimited in extent; for it is a maxim of the common law that, although the king is under no man, yet he is in subjection to God and the law, for the law makes the king.<sup>2</sup> And though the monarch is not personally responsible to any human tribunal for the exercise of the functions of royalty, yet these functions appertain to him in his political capacity, are regulated by law or by constitutional precept, and must be discharged for the public welfare, and not merely to gratify his personal inclinations. For the king is bound to govern his people, not according to his arbitrary will, but according to law.<sup>3</sup> "The law," in fact, "is the only rule and measure of the power of the crown, and of the obedience of the people;"<sup>4</sup> and "the body politic is reared upon the basis, that the law is above the head of the state, and not the head of the state above the law."<sup>5</sup> The maxim that "the king can do no wrong," while it sounds like a moral paradox, is, in fact, but the form of expressing a great constitutional principle, that no mismanagement in government is imputable to the sovereign personally; whilst, on the other hand, it is equally true that no wrong can be done to the people for which the constitution does not provide a remedy.<sup>6</sup> These seeming anomalies are reconciled by the fundamental doctrine that

<sup>1</sup> Broom's *Leg. Max.* 4th ed. p. 54; Bowyer, *Const. Law*, pp. 134-140; Atkinson's *Papinian*, p. 33.

<sup>2</sup> Broom's *Leg. Max.* p. 48; Hallam, *Const.* v. 3, p. 90.

<sup>3</sup> Broom, *Const. Law*, p. 63. And see in De Lolme, bk. i. c. viii., the manner in which the several prerogatives of the crown are limited and restrained by law, and their exercise subjected to the general control of parliament.

<sup>4</sup> Robert Walpole, on the impeachment of Dr. Sacheverell, *State Trials*, v. 15, p. 115.

<sup>5</sup> See Smith's *Parl. Rememb.* 1861, pp. 197-200.

<sup>6</sup> See Amos, *Eng. Const.* in the Reign of Charles II. pp. 11-19; Cox, *Eng. Govt.* p. 416; Case of Viscount Canterbury v. the Atty. Genl. 1 Phillips, 306.

the king can perform no act of government of himself, but that all acts of the crown must be presumed to have been done by some minister responsible to parliament. This principle, now so well understood, was not recognized in its entirety until a comparatively recent period: for, while it is a necessary corollary from the principles of government established by the revolution of 1688, we find it first insisted upon, without exception or qualification, in the reign of Queen Anne.<sup>1</sup>

During the earlier part of the reign of George III. the doctrine of ministerial responsibility continued in an unsettled state. Thus, in 1770, we find Dr. Johnson, who was a professed Tory, arguing that "a prince of ability might and should be the directing soul and spirit of his own administration—in short, *his own minister*, and not the mere head of a party; and then, and not till then, would the royal dignity be sincerely respected."<sup>2</sup> This passage seems to claim for the king that he should govern as well as reign. In Russell's *Memorials of Fox*, under the date of 1771, it is stated that about this time Lord George Germaine asserted in the House of Commons "that the king was *his own minister*, which Charles Fox took up admirably, lamenting that his Majesty was *his own unadvised minister*."<sup>3</sup> But, as we have already pointed out, the Whigs and Tories at this time differed radically in their ideas upon this subject, and neither party held what is now considered to be sound doctrine upon it. The Whigs arrogated to themselves the right of nominating all the king's ministers, not excepting the prime minister; whilst the Tories, going to the other extreme, claimed for the king, on his own personal responsibility, the right to select all the persons who should govern

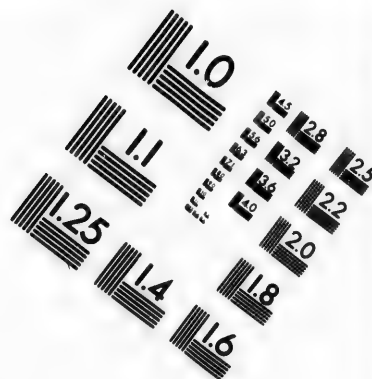
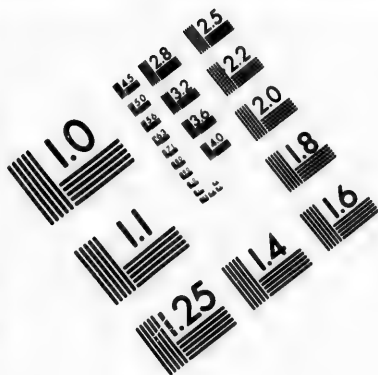
Misconception  
of the true  
principles of  
government.

<sup>1</sup> The Earl of Rochester, in the House of Lords, in 1711, protested against the doctrine "that the queen was to answer for everything," whereas "according to the fundamental constitution of this kingdom, the ministers are accountable for all" (*Parl. Hist.* v. 6, p. 972; Hearn, *Govt. of Eng.* p. 135). A similar statement was made by the Duke of Argyle in the House of Lords, in 1739 (*Parl. Hist.* v. 10, 1138). And in a debate in the House of Commons, on February 13, 1741, Sir John Barnard thus expressed himself: "The king may, it is true, exercise some of the prerogatives of the crown without asking the advice of any minister; but if he does make a wrong use of any of his prerogatives, his ministers must answer for it, if they continue to be his ministers" (*ib.* v. 11, p. 1268; and see *ib.* v. 12, p. 560).

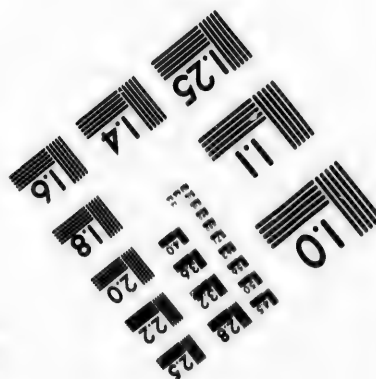
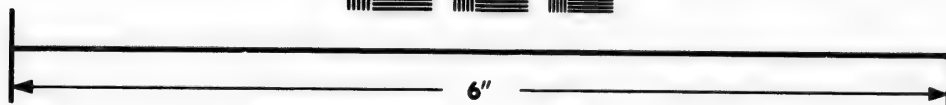
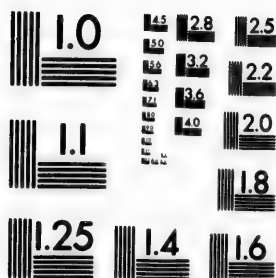
<sup>2</sup> Boswell's *Johnson*, v. 3, p. 131.

<sup>3</sup> Russell's *Fox*, v. 1, p. 203.





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the state.<sup>1</sup> With these discordant ideas and rival claims, which are now admitted by all parties to be equally untenable, it is no wonder that the true principles of government should have been so frequently disregarded on every side. Ere long, however, they were amply vindicated. During the memorable debates of 1807, when the king dismissed his ministers because they refused to sign a pledge which he had no right to exact of them, more intelligent and enlightened opinions as to the relative position of the king and his ministers were expressed by all the leading statesmen in parliament, of every creed. On this occasion we find it distinctly enunciated as incontrovertible maxims: "1. That the king has no power,

The king and  
the constitu-  
tion.

by the constitution, to do any public act of government, either in his executive or legislative capacity, but through the medium of some minister, who is held responsible for the act; 2. That the personal actions of the king, not being acts of government, are not under the cognisance of law."<sup>2</sup> This is now universally accepted as sound doctrine.

It has always been acknowledged, however, with more or less distinctness, that the king's ministers were answerable for all acts of government that could in any way be traced to their advice or co-operation.

Ministerial  
responsibility  
fully  
recognized.

Either by parliamentary censure, or impeachment, or by ordinary process of law, unworthy ministers have, from a very early period, been called to account for complicity in acts of misgovernment. But this mode of redress was invariably doubtful and uncertain. In the days when the collective responsibility of the administration for the acts of each individual minister formed no part of the theory of government, it was not easy to ascertain upon whom to affix the responsibility for any particular offence. So long as a minister of state retained the favour of his sovereign, it was difficult, if not impossible, to convict him of misconduct, or make him amenable for misdeeds agreed upon in secret, and which were perhaps commanded by the king himself; so that opposition to a suspected favourite commonly took the shape of intrigues to

<sup>1</sup> *Ante*, p. 66; and see *Ed. Rev.* v. 18, p. 46; Mr. Allen, on *Royal Prerogative*.

<sup>2</sup> *Ld. Selkirk, Parl. D.* v. 9, p. 381; and Mr. Adam, *Ib.* v. 16, p. 2\*\*\*; and see Maley's *William IV.* v. 2, p. 134.

displace him from power, or gave rise to open resistance to the crown itself.

As a pledge and security for the rightful exercise of every act of royal authority, it is required by the constitution that the ministers of state for the time being shall be held responsible to parliament and to the law of the land for all public acts of the crown.

Responsibility  
of ministers  
for acts of the  
crown.

This responsibility, moreover, is not merely for affairs of state which have been transacted by ministers in the name and on behalf of the crown, or by the king himself upon the advice of ministers, but it extends to measures that might possibly be known to have emanated directly from the sovereign. If, then, the sovereign command an unlawful act to be done, the offence of the instrument is not thereby indemnified; for though the king is not personally subject to the coercive power of the law, yet in many cases his commands are under its directive power, which makes the act itself invalid if it be unlawful, and so renders the instrument of its execution obnoxious to punishment.<sup>1</sup> And, if the rights of any subject should have been infringed by a wrongful act committed by command of the sovereign, the ordinary courts of justice will grant a remedy.

The personal command of the king is no excuse for a wrong administration of power. Lord Danby was impeached for a letter which contained a postscript in the king's own hand, declaring that it had been written by his order. And, although the king is the fountain of justice, a commitment by his own direction has been held to be void, because there was no minister responsible for it.<sup>2</sup> In a constitutional point of view, so universal is the operation of this rule, that there is not a moment in the king's life, from his accession to his demise, during which there is not some one responsible to parliament for his public conduct; and "there can be no exercise of the crown's authority for which it must not find some minister willing to make himself responsible."<sup>3</sup> "The king, being a

<sup>1</sup> Hale, pp. 43, 44.

<sup>2</sup> Russell, *Eng. Const.* p. 159. See Broom, *Const. Law*, pp. 244, 246, 615; Pollock in *Fort. Rev.* N.S. v. 30, p. 486.

<sup>3</sup> See Lds. Erskine and Holland's speeches, in *Hans. D.* v. 9, pp. 363, 414; Mr. Adam's speech, *ib.* v. 16, p. 8 \*\*\*\*; Sir H. Nicolas, *Proc. Privy Coun.* v. 6, p. 200, and Grey's *Parl. Govt.* new ed. p. 326, n. The resolution of Queen Victoria to bestow the hand of the Princess Louise

body politique, cannot command but by matter of record." <sup>1</sup> Therefore, whenever the royal sign-manual is used, it is necessary that it should be countersigned by a responsible minister, for the purpose of rendering it constitutionally valid and authoritative. <sup>2</sup>

If a peer of the realm desires to avail himself of his privilege of peerage to solicit an audience of the sovereign, <sup>3</sup> to make any representations on public affairs, it is necessary that he should apply for an interview through an officer of the royal household, or through the secretary of state for the Home Department. <sup>4</sup> But the exercise of this privilege of the peerage should be limited by prudential considerations. One of these ought to be the utility of the course to be pursued; and the propriety of avoiding anything calculated to embarrass the relations between the sovereign and his ministers. <sup>5</sup> And no peer should take advantage of an audience with the sovereign to become the medium for presenting petitions or addresses from the people. Such documents can only be suitably presented through a secretary of state, or at a levée or public audience, in the presence of the king's ministers. A secretary of state is the constitutional channel for conveying the royal reply to such addresses. All letters or reports on public affairs intended for the government of Great Britain must be addressed to the king's minister, not to the sovereign personally; that is to say, to the secretary of state to whose department their subject-matter would probably belong. <sup>6</sup>

Public audience must be through an official.

Communicates with foreign powers, etc., through ministers.

upon a British subject was not taken "without the advice of responsible ministers." Mr. Gladstone, *Hans. D.* v. 204, pp. 173, 370.

<sup>1</sup> 2 Inst. (Coke), 186; Hearn, *Govt. of Eng.* p. 94.

<sup>2</sup> Park, *Lectures on the Dogmas of the Const.* p. 33; Lewis, in *Hans. D.* v. 165, p. 1486. The sovereign's signature is first appended, afterwards that of the Secretary of State (*Rep. Com.* on *Pub. Accounts*, 1865, v. 10, Ev. 2086, 2185).

<sup>3</sup> See Stubbs, *Const. Hist.* v. 3, p. 498.

<sup>4</sup> Colchester Diary, v. 3, pp. 603-614; *Hans. D.* v. 180, p. 340. See *Wellm. Desp.* 3rd ser. v. 5, pp. 557-560, 564, 567, 578; *Ib.* v. 8, pp. 168, 448.

<sup>5</sup> *Ib.* v. 7, p. 424; v. 8, p. 168.

<sup>6</sup> Ld. John Russell, *Hans. D.* v. 130, p. 190. In 1810, a violation of this rule was made the subject of parliamentary inquiry. Lord Chatham, being at the time a privy councillor and a cabinet minister, accepted the post of commander of the expedition to the Scheldt. On his return to

The constitutional channel of approach to the person of the sovereign is by means of a secretary of state, and it is through such an officer that the royal pleasure is communicated in regard to acts of government. Whenever the sovereign is temporarily absent from his usual places of residence, it is necessary that a secretary of state or other responsible minister should be in attendance upon him.<sup>1</sup>

At every interview between the sovereign and the minister

England, he presented to the king, at a private interview, a narrative, drawn up by himself, of the conduct of the expedition, in which he criminated one of his colleagues in the ministry, and brought serious charges against an admiral who had been employed conjointly with himself in the expedition. He did this, unknown to any other cabinet minister, and requested the king not to communicate the paper to any one, at least for a time. The document remained in the king's possession for nearly a month, when Lord Chatham asked to have it returned to him, in order that he might make some alterations in it. Upon receipt of the paper, Lord Chatham expunged a paragraph therein, and returned it to his Majesty. When the narrative again reached his hands, the king directed that it should be forwarded to the secretary of state, for the purpose of making it an official paper. It was afterwards transmitted to the House of Commons, when its peculiar history transpired (*Parl. D.* v. 15, p. 482). The House called for the attendance of Lord Chatham at the bar, and questioned him as to whether he had, on any other occasion, made such a communication to the king; but he refused to answer, and, being a peer, could not be compelled to do so. Whereupon, on February 23, on motion of Mr. Whitbread, the house agreed to an address to the king (on division, against ministers), praying for copies of all reports or papers at any time submitted to his Majesty by Lord Chatham relative to the expedition to the Scheldt. In reply to this address, the king made known to the House of Commons the circumstances under which he had received Lord Chatham's communication, and stated that no other reports or papers concerning the Scheldt expedition had been presented to him by that nobleman (*Ib.* p. 602). On March 2, Mr. Whitbread submitted to the House resolutions of censure upon Lord Chatham for his unconstitutional conduct. The previous question was proposed thereupon, on the part of the administration, and negatived. But an amendment, proposed by Mr. Canning, in modified terms of censure, was accepted by Mr. Whitbread, and agreed to by the house. It was then moved that the resolutions be communicated to the king; but, the opinion being generally entertained that the sense of the House in regard to this transaction had been sufficiently expressed by the recording of the resolutions upon the Journals, and that it would not be consistent with the dignity of the House to proceed any further in the matter, this motion was withdrawn (*Parl. D.* v. 16, p. 12).

<sup>1</sup> Macaulay, *Hist. of Eng.* v. 4, p. 9. The duty of constant attendance on the sovereign used to be taken by the secretaries of state in turn; but within the last few years this duty has been taken by all the cabinet ministers in turn (*E. A. Freeman, Inter. Rev.* v. 2, p. 375).

of any foreign court, it is the duty of the secretary of state for foreign affairs to be present. Private communication between a king of England and foreign ministers is contrary to the spirit and practice of the British constitution. George III. invariably respected this rule. During the reign of his successor it was not so strictly adhered to; but, upon the appointment of Mr. Canning as foreign secretary, he restored and maintained the constitutional usage.<sup>1</sup>

The king must always act through a minister.

"It is quite unusual that a foreign sovereign should write to the sovereign of England on politics,"<sup>2</sup> or affairs of state; for as the British monarch can be no party to an act of state personally, but only through the instrumentality of others, who are responsible for the act, so he can neither sign a treaty nor accede to the terms of a treaty personally, in the first instance. He negotiates, concludes, and signs by plenipotentiaries, whom he empowers to do those acts. He afterwards ratifies what they have done, if he approves of it; but to this ratification the Great Seal must be attached.<sup>3</sup>

Moreover, it is not usual for the king of England to receive from other sovereigns letters upon public questions which do not pass through the hands of his ministers; and sometimes such letters have been returned, because copies were not sent (with the sealed letter) for the information of the minister. It is still more unusual and improper for the king to answer a letter from another sovereign without the advice of his minister, who, whether he advises or does not, is responsible if he knows of the letter being written.<sup>4</sup>

<sup>1</sup> Stapleton, *Canning and his Times*, p. 433.

<sup>2</sup> Ld. Palmerston in *Bunsen's Mem.* v. 2, p. 150.

<sup>3</sup> Yonge's *Life of Ld. Liverpool*, v. 2, p. 232.

<sup>4</sup> *Welln. Desp.* Civil S. v. 6, pp. 313, 319; Martin, *Pr. Consort*, v. 3, pp. 39, 45. When Napoleon was first Consul of France, he addressed a letter, containing proposals of peace between France and England, to George III.; but it was acknowledged and answered by the foreign secretary (Stapleton, *Canning and his Times*, p. 47). See also the case of the autograph letter addressed by the Emperors of Austria and Russia, and the King of Prussia, to the Prince Regent, in 1815 (Yonge, *Life of Ld. Liverpool*, v. 2, pp. 226-234). In 1847 the King of Prussia wrote a private letter to Queen Victoria relating to a political question of European affairs, which he requested his ambassador to deliver to her Majesty at a private audience. But, by the interposition of Prince Albert, this unintentional irregularity was corrected, the letter was read in the



While the sovereign, as the fountain of justice and the source of all political authority and jurisdiction in the realm, is presumed to be personally present in every court of law, and especially in the High Court of Parliament, justice must be dispensed and laws enacted in the king's name, in strict conformity to the laws, usages, and customs of the constitution. And by the common law itself, and more especially since the formal recognition of the doctrine of ministerial responsibility, the sovereign of England is constitutionally debarred from the public or personal exercise of any functions of royalty, except such as are necessary to express the royal pleasure in regard to acts of state which have been advised or concurred in by constitutional ministers. For example, although in the eye of the law the king is always present in all his courts, he is not above the law, and cannot personally assume to decide any case, civil or criminal, but must do so by his judges.<sup>1</sup> And, when any judicial act is by any Act of Parliament referred to the king, it is understood to be done in some court of justice according to the law.<sup>2</sup> Even the prerogative of mercy cannot now be exercised, except under the direction of ministers.<sup>3</sup> Neither presence of the foreign secretary, and the reply discussed with and approved of by him (See *Bunsen's Mem.* v. 2, pp. 149-151). "All letters received by the Queen and Prince Consort from foreign potentates, and all answers to them, were shown to the Foreign Secretary or to the Prime Ministers" (Martin, *Prince Consort*, v. 4, p. 329. See Amos, *Fifty Years' Eng. Const.* p. 328).

Does not act in his personal capacity.

<sup>1</sup> Broom's *Const. Law*, pp. 145-148; and see Hearn, *Govt. of Eng.* pp. 66-74.

<sup>2</sup> Stephen's *Blackstone*, v. 2, p. 483; 2 *Co. Inst.* p. 186; and see Fischel, *Eng. Const.* p. 238; and Ld. Camden's *Judgment in Shipley's case*, wherein the king had been appealed to, as visitor of a college which was a royal foundation.

<sup>3</sup> See *Colchester Diary*, v. 3, p. 297; Martin, *Pr. Consort*, v. 1, p. 141. In 1830, a Mr. Comyn was sentenced to death, in Ireland, for arson. King George IV. was petitioned on his behalf, and was induced to write himself to the lord-lieutenant, signifying his pleasure that the sentence should be mitigated. Meanwhile, the lord-lieutenant, upon advice of the law officers, had decided that the law should take its course; and the prime minister (the Duke of Wellington) and home secretary (Mr. Peel) approved of this determination. Mr. Peel, indignant that the king should have exercised the prerogative of mercy without taking the advice or opinion of himself, or of any other responsible minister, addressed a strong remonstrance to his Majesty; ultimately, through the interposition of the prime minister, the king withdrew his order, and the original sentence was carried out (*Wellm. Desp.* Civil S. v. 6, pp. 553-577).

can the sovereign constitutionally make any appointments to office without previously communicating with the prime minister, and acting with his sanction and consent.<sup>1</sup> And though the sovereign be present in the House of Lords at any time during the deliberations of that House, seated upon the throne, yet his presence would now be considered a departure from constitutional usage, which forbids the sovereign to interfere or take part in any of the proceedings of Parliament, except when he comes in state for the exercise of the royal prerogatives.<sup>2</sup> Up to the reign of Queen Anne it was customary for the sovereign to attend debates in the House of Lords as a spectator, and his presence was duly recorded in the journals; but since the accession of George I. this questionable practice, which might be used to overawe the assembly and influence their debates, has been wisely discontinued.<sup>3</sup> And, although the king is the acknowledged head of the military forces of the empire, no English monarch has taken the field in person since the reign of George II. "A contrary practice," says a recent writer on the English Constitution, "would not accord with modern parliamentary usage."<sup>4</sup>

But, if the exercise of personal power by the sovereign be thus limited and circumscribed, it may be thought The kingly office no fiction. that the monarchy of England exists only in name, and that the authority of the king is a mere legal fiction, to express the dominion exercised by certain public functionaries who have obtained possession of supreme power. Such an idea is very erroneous; for, while the usages of the constitution have imposed numerous restrictions upon the crown in the conduct of state affairs, these restrictions have been established to secure good government and to protect the liberty of the

<sup>1</sup> *Welln. Desp.* Civil S. v. 6, p. 181.

<sup>2</sup> Hearn, *Govt. of Eng.* pp. 58, 59.

<sup>3</sup> May, *Parl. Prac.* ed. 1883, p. 503.

<sup>4</sup> Fischel, *Eng. Const.* p. 139; and see Macaulay, *Hist. of Eng.* v. 4, p. 10. Upon the death of H.R.H. the Duke of York, in January, 1827, his Majesty King George IV. expressed an intention of personally assuming the command of the British army. But the premier (Lord Liverpool!) said that such a thing "was preposterous, and that he would never consent to it." Sir R. Peel also spoke of it as "almost incredible," and "as pregnant with unceasing embarrassment to the government." Accordingly, upon the advice of Lord Liverpool, the office was conferred upon the Duke of Wellington (*Welln. Desp.* 3rd ser. v. 3, pp. 531-535).

subject, and not with a view to reduce the authority of the crown to a nullity.

Before attempting to define the nature and limit of the authority which rightly appertains to a reigning monarch, it may be profitable to point to a few examples indicative of the extent of interference in affairs of state which has been claimed and exercised by English sovereigns since the accession of the House of Hanover. Our illustrations upon a subject so delicate, and upon which so little is recorded, will necessarily be very few. Nevertheless, they may serve to mark the growth of political opinion on the subject, and to show how much, in this as in other matters, depends upon the force of individual character.

Personal acts  
of government  
since Queen  
Anne's reign.

The dogma of the impersonality of the sovereign is the offspring of the revolution of 1688, although, as we have already seen,<sup>1</sup> it found no favour, either in theory or practice, in the eyes of William III.

Impersonality  
of the sove-  
reign.

It began to be asserted as a constitutional principle in the reign of Queen Anne, who, unlike the great Elizabeth, had no special administrative capacity, although she clung to the exercise of power with great tenacity. The weakness and inexperience of a female sovereign, combined with the acknowledged necessity for governing by means of a ministry acceptable to Parliament, gave increased weight to the advocates of this doctrine. Though her personal predilections were in favour of the Tories, Queen Anne was compelled, for a great part of her reign, to accept a Whig ministry. Distrusting her own judgment, she surrendered herself to the counsels of the leading spirit whom for the time she admitted as her guide. And yet, like all her predecessors, she kept in her own hands the reins of government, jealous, as such feeble characters usually are, of those in whom she was forced to trust. Obstinate in her judgment, from the very consciousness of its weakness, she took a share in all business, frequently presided in meetings of the cabinet, and sometimes gave directions without their advice.<sup>2</sup> In the impeachment of Lord Oxford by the Commons, for alleged treasonable acts, he

Queen Anne.

<sup>1</sup> *Ante*, p. 56.

<sup>2</sup> Hallam, *Const. Hist.* v. 3, pp. 314, 315; Stanhope, *Queen Anne*, pp. 38, 542.

states in his defence that he had acted under the immediate commands of the queen, in the matter specially complained of, using these words: "My lords, if ministers of state, acting by the immediate commands of their sovereign, are afterwards to be made accountable for their proceedings, it may one day or other be the case of all the members of this august assembly"<sup>1</sup>—a species of defence similar to that urged by Lord Somers in the case of the Partition Treaty, but which was undoubtedly irregular and insufficient.

Throughout the reigns of the first two Georges, the principle of the royal impersonality continued to make progress,—but rather through the incapacity for the details of administration arising from the foreign education of both these monarchs, and the force of circumstances which compelled them to entrust to the leaders of the dominant Whig party authority which they felt incompetent to exercise, than because either the nation or the political philosophers of the day were prepared to accept it in theory.<sup>2</sup>

It is a fact that would be hardly credible, were it not so well attested, that George I., being as incapable of conversing in English, as his chief minister, Sir Robert Walpole, was of conferring with him in French, they were compelled to hold communication with each other in the Latin language.<sup>3</sup> It is impossible that, in such circumstances, the king could have obtained much insight into the domestic affairs of England, or become familiarized with the character of the people over whom he had been called to rule. "We know, indeed, that he nearly abandoned the consideration of both, and trusted his ministers with the entire management of the kingdom, content to employ its great name for the promotion of his Electoral interests. This continued, in a less degree, to be the case with his son, who, though better acquainted with the language and circumstances of Great Britain, and more jealous of his prerogative, was conscious of his incapacity to determine in matters of domestic government, and reserved almost his whole attention for the politics of Germany."<sup>4</sup>

<sup>1</sup> *Parl. Hist.* v. 7, p. 105.

<sup>2</sup> See *Quar. Rev.* v. 105, Art. 6.

<sup>3</sup> Coxe's *Walpole*, v. 1, p. 266; H. Walpole's Works, v. 4, p. 476; and see Campbell's *Chanc.* v. 4, p. 340.

<sup>4</sup> Hallam, v. 3, pp. 389, 390.

In describing the character and conduct of the first two Georges, Hallam intimates of both of them that they forced upon their ministers the adoption of a foreign policy adverse to the interests of England and directed to the aggrandisement of Hanover: but that, so far as domestic politics were concerned, they surrendered almost everything into the hands of their ministers, so that during their reigns "the personal authority of the sovereign seems to have been at the lowest point it has ever reached."<sup>1</sup> But, so far as regards George II., this conclusion is contradicted by the researches of later writers. Although this monarch, equally George II. with his predecessor, rendered the interests of his British dominions subservient to those of his German principality, he was, nevertheless, fond of the exercise of arbitrary power, and unwilling to yield his prerogative into the hands of ministers. By the publication of the *Life of Lord Hardwicke*, for many years one of the principal advisers of George II., great light has been thrown upon the political history of this reign.

On the occasion of certain ministerial changes, which had been brought about by the leading members of the cabinet in order to strengthen their position in parliament, a curious conversation is reported to have taken place between Lord Chancellor Hardwicke and the king, in which his Majesty declared his aversion to the new men who had been introduced into the ministry, and asserted that he had been "forced" and "threatened" into receiving them. The chancellor deprecated the use of such language, saying that "no means had been used but what have been used at all times—the humble advice of your servants, supported by such reasons as convinced them that the measure was necessary for your service." After some further explanations, the chancellor observed, "Your ministers, sire, are only your instruments of government;" to which the king replied, with a smile, "Ministers are the king in this country."<sup>2</sup> But, while the force of circumstances compelled the king to give way on this occasion, the Hardwicke papers afford frequent examples of his active and successful interference in the government of the country. "To a large extent," says the biographer of Lord Hardwicke, "he was not only the chooser of his own

<sup>1</sup> Hallam, v. 3, p. 393.

<sup>2</sup> Harris, *Life of Hardwicke*, v. 2, pp. 106-109.

ministers, but the director also of all the most important measures propounded by them ; and into every political step taken he seems to have entered fully, even to the very details. As a politician, his great fault, especially for a king, was his being so decided a partisan. He was the sovereign and the head, in fact, not of the English people, but of the Whig party."<sup>1</sup>

But the peers and landed gentry of this period were possessed of enormous political influence, and the united efforts of the leading Whig families gave them an authority greater even than that of king and commons combined. So that "when George III. came to the throne, the English Government was, in practice, assuming the form of an exclusive oligarchy," in which the king, though nominally supreme, was entirely bereft of substantial power.<sup>2</sup>

Naturally ambitious and self-reliant, the youthful sovereign began his reign with a determination to exercise to the fullest possible extent the functions of royalty. Born a Briton, and prepared by careful training for the duties of his exalted station, he became at once popular with the country at large, who were ready to sustain him in any attempt to magnify his office. In a previous chapter we have had occasion to dwell upon the character of George III.,<sup>3</sup> and to point out several instances of his departure from the line of conduct which should characterize a constitutional king, and our further observations on this subject must necessarily be brief. Regarded in the light of the relations which now exist between the sovereign and his responsible advisers, the conduct of George III. would call for unqualified censure, from his systematic endeavours to govern by the exercise of his personal authority, and to absorb in himself the power and patronage of the state. Such practices are incompatible with the acknowledgment of parliamentary government, and would be neither tolerated nor attempted in our own day. Nevertheless, before we condemn George III. for pursuing a policy at variance with our present political ideas, we should remember that the theory of royal impersonality was but partially understood when he ascended the throne. And not only was this

<sup>1</sup> *Life of Hardwicke*, v. 3, p. 222.

<sup>2</sup> Massey, *Reign of George III.* v. 1, pp. 64, 519.

<sup>3</sup> *Ante*, pp. 61-67.



particular theory still unrecognized as a constitutional principle, but the practice of his immediate predecessors, who had voluntarily abstained, for various reasons, from much personal interference with the details of government, had fallen into disavow. The country was heartily sick of the victories of court intriguers, and the monopoly of power in the hands of certain "Revolution families;" and the young monarch, in obeying his mother's emphatic exhortation of "George, be a king!" did but respond to the popular will, although the experience of the first year of his reign should have sufficed to convince him of its unstable and misleading character.<sup>1</sup> Notwithstanding his moral and exemplary life, his sympathies with the popular prejudices, and his genuine endeavours to govern for the good of all classes of his subjects,—his frequent interference in the smallest details of administration and consequent disregard of the obligations of responsible government, caused him to suffer during his lifetime from the violent attacks of political partisans, and has loaded his memory with an amount of calumny and misrepresentation from which it is only now beginning to recover.<sup>2</sup>

But if we make due allowance for the difficulties of his position, and the temptations to an exaggerated idea of his personal authority natural to a time when the sovereign was still permitted to govern as well as reign, we must acquit him of any intentional violation of the constitution; and at the same time admit that his integrity of purpose, and rigid adherence to the line of duty, according to his lights, entitle him to be regarded as "a patriot king." We may unreservedly condemn his unconstitutional acts, but should yet be willing to confess that much that was faulty in his conduct was "simply the natural result of a complicated position, still undefined, and the working of a spirit as yet inexperienced in government, and seeking with hesitation its course and its friends."<sup>3</sup> During an unusually protracted reign, George III. devoted himself to the fulfilment of his royal duties with the

<sup>1</sup> *Quar. Rev.* v. 103, Art. 6.

<sup>2</sup> Brougham, *Brit. Statesmen* (ed. 1858), v. 1, p. 13; and see Edison's Commentary on Brougham's *Character of George III.* (London, 1860).

<sup>3</sup> This felicitous phrase was applied by M. Guizot to the conduct of Louis Philippe after his elevation to the throne of France (Guizot's *Mem.* v. 2, p. 45).

most scrupulous and constant care, diligently superintending every movement of the great political machine.<sup>1</sup>

George IV. had not the weight of personal character that belonged to his father. Naturally of an indolent disposition, he was called to the throne too late in life to become thoroughly acquainted with the duties of his office, or to care for burthening himself with the details of government. He was unpopular with the nation, having alienated from himself their respect and good will by his conduct as a prince. He was indifferent to the exercise of political power, except when his own feelings or interests were concerned, when he could be as imperative as his father. He strenuously opposed the recognition of the independence of the Spanish South American provinces, and also the granting of Roman Catholic emancipation in Great Britain, but was compelled to acquiesce in the policy of his cabinet upon these questions. Otherwise, he seldom differed in opinion from his responsible advisers, and was content, for the most part, to leave the functions of administration in their hands.<sup>2</sup> "It may, therefore, be said, that, from the beginning of his regency in 1811 to the close of his reign in 1830, the regal influence was limited to the strict exercise of the prerogative. George IV. had no personal influence: instead of his popularity supporting the ministry, the difficulty was for the ministry to support his unpopularity, and to uphold the respect for the crown when it encircled the head of such a sovereign."<sup>3</sup>

William IV. was an amiable monarch, of an honest and truthful disposition, but deficient in strength of character. His letters to Lord Grey "supply abundant evidence of the conscientious industry with which he must have laboured to make himself master of the public questions of the day, so as to be able efficiently to perform in this respect his duty as a sovereign."<sup>4</sup> He ascended the

<sup>1</sup> Mahon, *Hist. of Eng.* v. 4, p. 310.

<sup>2</sup> May, *Const. Hist.* v. 1, p. 99; and see the king's correspondence with his ministers in Yonge, *Life of Ld. Liverpool*; and in *Welln. Desp.* 3rd ser.

<sup>3</sup> Lewis, *Adminis.* p. 421.

<sup>4</sup> Lord Grey, *Corresp. with William IV.* v. 1. pref. pp. viii. xiv.; and see his *Majesty's Memoir*, addressed to Sir R. Peel in 1835, of his conduct and principles from the period of his accession in 1830 to the change of ministry in Jan. 1835; in Stockmar's *Mem.* v. 1, pp. 314-350.

throne at an advanced age, and found himself unable to cope successfully with the embarrassing questions which arose during his short but eventful reign. Averse to parliamentary reform, and fearful of its consequences, he nevertheless gave a reluctant consent to the great experiment. But ere long his mind underwent a reaction; he withdrew his confidence from the statesmen by whom that measure had been accomplished, and attempted to form a Tory government. But the endeavour proved abortive. He learned to his chagrin that the preponderance of power was now firmly established in the House of Commons, that the mere prerogative and influence of the crown were insufficient to effect a change of administration, unless seconded by the voice of that assembly, or by the unequivocal expression of popular opinion.<sup>1</sup>

Upon the resignation of Sir R. Peel's short-lived administration, the king reluctantly accepted another Whig ministry, presided over by Lord Melbourne. But though he did not always disguise his disinclinations towards them, and sometimes strenuously opposed their measures,<sup>2</sup> yet we have the assurance alike of Whig and Tory statesmen that "his Majesty uniformly acted with scrupulous fidelity towards his advisers, whatever might be their political bias;"<sup>3</sup> and in the two Houses of Parliament, after the king's decease, the leading politicians, without respect to party, vied with one another in bearing testimony to his exemplary conduct as a constitutional sovereign.<sup>4</sup>

Since the accession of our present queen, the personal predilections of the sovereign in respect to an existing <sup>Queen</sup> administration have never been brought into <sup>Victoria.</sup> public view. While she has abated nothing of the legitimate influence and authority of the crown wherever it could be constitutionally exercised, her Majesty has scrupulously and

<sup>1</sup> Bagehot, *Eng. Const.* p. 284.

<sup>2</sup> See Lord Broughton's Recollections, in *Ed. Rev.* v. 133, pp. 317-324; Torrens, *Life of Melbourne*, v. 2, c. v.

<sup>3</sup> Peel's *Mem.* v. 2, p. 16; Lord Grey, *Corresp.* v. 1, pp. vii. ix.

<sup>4</sup> Knight, *Hist. Eng.* v. 8, p. 377. [Those who have carefully examined the correspondence of William IV. with his ministers will dissent from some of Mr. Todd's conclusions. The praise which was publicly accorded to William IV., after his death, by Lord Melbourne, and others, contrasts strangely with the opinions of the king's conduct which they privately expressed during his lifetime.—*Editor.*]

unreservedly bestowed her entire confidence upon every ministry in turn with which public policy, or the preference of Parliament, has surrounded the throne.<sup>1</sup> "It is well known," says a recent political writer, "that her Majesty has habitually taken an active interest in every matter with which it behoves a constitutional sovereign of this country to be concerned; in many instances her opinion and her will have left their impression on our policy. But in no instance has the power

Her wise  
exercise of pre-  
rogative.

of the crown been so exercised as to expose it to check, or censure, or embarrassment of any kind.<sup>2</sup>

It may be asserted without qualification, that a sense of general content, of sober heartfelt loyalty, has year by year gathered around the throne of Victoria."<sup>3</sup> The present writer would add to this his sincere conviction, that attachment to the person and throne of our gracious queen is not confined to the mother-country, but extends with equal if not greater intensity to the remotest bounds of her immense empire; and that few could be found, even in lands that owe her no allegiance as a sovereign, who would not willingly unite in a tribute of respect and admiration for Victoria, as a woman, a mother, and a queen.

During the present reign three questions, previously undetermined, which intimately affect the personal rights of the sovereign, have been discussed and disposed of. They will fittingly claim our attention before we proceed to define the constitutional position of the crown in public affairs. They concern—

1. The appointment of officers of the royal household.
2. The right of the sovereign to employ a private secretary.
3. The constitutional position of a prince consort.

1. Owing to the gradual introduction of the usages which have been incorporated by time into the unwritten law of the British Constitution, it was not until the end of the reign of George II. that it became customary to make alterations in the household establishment of our sovereigns upon a change of ministry.<sup>4</sup>

Appointments  
in the royal  
household con-  
trolled by  
ministers.

<sup>1</sup> See Stockmar's *Mem.* v. 2, pp. 52-55; Ld. John Russell, *Hans. D.* v. 130, p. 182; Lord Granville and the Duke of Richmond, *ib.* v. 208, pp. 1069, 1070.

<sup>2</sup> See Lord Russell, in *Hans. D.* v. 175, p. 615.

<sup>3</sup> *Ed. Rev.* v. 115, p. 211; Mr. Foster, in *Hans. D.* v. 228, p. 150.

<sup>4</sup> *Parl. D.* v. 23, p. 412.

But it is a fundamental principle of parliamentary government, that "the responsible servants of the crown are entitled to advise the crown in every point in which the royal authority is to be exercised;"<sup>1</sup> and nothing could tend more to enfeeble an administration than that certain high offices, held during pleasure, should be altogether beyond their control. Accordingly, from the accession of George III. it became a recognized practice to concede this privilege to every successive administration.<sup>2</sup>

Upon the resignation of the Melbourne ministry in 1839, and before the difficulty arose between her Majesty and Sir Robert Peel respecting the ladies of the <sup>Ladies of the</sup> bedchamber, Lord Melbourne informed the Queen "that it had been usual in later times, when an administration was changed, to change also the great officers of the household, and likewise to place at the disposal of the person entrusted with the formation of a new administration those situations in

<sup>1</sup> Mr. Ponsonby, *Parl. D.* v. 23, p. 431.

<sup>2</sup> Thus we find that when George III. dismissed the North ministry, in 1782, he was obliged to dismiss Lord Hertford from the office of lord chamberlain, which he had held for fifteen years; and to appoint Lord Effingham, whom he disliked, to be treasurer of the household. Even the aged Lord Bateman, who was the king's personal friend, was obliged to resign his office of master of the buckhounds (Fischel, *Eng. Const.* p. 520; as corrected by Haydn, *Book of Dignities*, p. 206; Downe, *Corresp. George III.* v. 2, p. 420). Similar difficulties, in regard to appointments in the household, attended the formation of the Portland ministry in the following year (Tomline, *Life of Pitt*, v. 1, p. 149, *n.*; *Parl. Hist.* v. 23, p. 695). But during Mr. Pitt's administration, George III. (as he afterwards told Mr. Rose) "insisted on having in his household such persons as he could, with comfort to himself, associate with occasionally" (Rose, *Corresp.* v. 2, p. 158). This is a privilege which no minister, at any time, would have thought of denying to his sovereign (see *Life of Earl of Minto*, v. 3, p. 337).

Again, in 1812, when negotiations were set on foot for the reconstruction of the ministry, after the assassination of Mr. Perceval, a question was raised as to whether the appointment of officers in the royal household should form part of the proposed ministerial arrangements, or should be left to the determination of the sovereign. Lords Grey and Grenville, having been invited by the Prince Regent to join the new administration, declined to do so unless the actual incumbents of these offices were first dismissed. In the subsequent explanations in parliament, it was admitted that an incoming administration had a right to claim the removal of the great officers of the household, although the exercise of such a right on the present occasion was, for special reasons, deemed inexpedient and impolitic.

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ll, *Hans. D.*  
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the household which were held by members of either House of Parliament."<sup>1</sup> Sir Robert Peel urged that, in view of the throne being filled by a female sovereign, the same principle should apply to the chief appointments which were held by the ladies of her Majesty's household, including the ladies of the bedchamber. This was objected to by the Queen, who declared that she must reserve to herself the whole of those appointments, and that it was her pleasure that no change should be made in the present incumbents. In these circumstances it was impossible for Sir Robert Peel to persevere in the attempt to form a ministry. He therefore wrote to her Majesty, and stated that it was essential to the success of the commission with which he had been honoured, "that he should have that public proof of her Majesty's entire support and confidence which would be afforded by the permission to make some changes in that part of her Majesty's household which her Majesty resolved on maintaining entirely without change." The Melbourne ministry were then reinstated in office, and they at once recorded their opinion on the point at issue in a minute of council as follows: "That for the purpose of giving to the administration that character of efficiency and stability, and those marks of the constitutional support of the crown, which are required to enable it to act usefully to the public service, it is reasonable that the great offices of the court, and situations in the household held by members of Parliament, should be included in the political arrangements made on a change of the administration; but they are not of opinion that a similar principle should be applied or extended to the offices held by ladies in her Majesty's household."<sup>2</sup>

But two years afterwards, when it became necessary for the queen to apply again to Sir Robert Peel to undertake the formation of a government, "no difficulties were raised on the Bedchamber question." Through the interposition of Prince Albert, her Majesty was induced to take a more correct view of her position towards the incoming ministers upon this question, and, by previous negotiation with Sir R. Peel, the matter was satisfactorily arranged before the change of ministry

<sup>1</sup> *Mir. of Parl.* 1839, p. 2411.

<sup>2</sup> *Ib.* pp. 2415, 2421. After his retirement from public life, Lord Melbourne is said to have regretted the stand he took upon this question (*Quar. Rev.* v. 145, p. 225).



took place. Those ladies of the household only who were near relatives of the outgoing cabinet ministers retired, the others were permitted to remain.<sup>1</sup> "The principle which Sir R. Peel applied to the household has since been admitted, on all sides, to be constitutional. The offices of mistress of the robes and ladies of the bedchamber, when held by ladies connected with the outgoing ministers, have been considered as included in the ministerial arrangements. But ladies of the bedchamber, belonging to families whose political connection has been less pronounced, have been suffered to remain in the household, without objection, on a change of ministry."<sup>2</sup> On the accession of the Derby ministry, in 1866, the ladies of the court remained unchanged, not having owed their appointments to political influence. And Lord Torrington continued in office as one of the lords in waiting, at the personal request of her Majesty.<sup>3</sup>

2. Until the reign of George III. none of the English monarchs ever had a private secretary. It naturally formed a part of the duty of the principal secretaries of state to assist the sovereign in conducting his official correspondence; but such were the habits of industry and attention to the duties of his exalted station which characterized George III., that it was not until his sight began to fail that he would permit another person to assist him in transacting the daily business of the crown. In 1805, however, his Majesty became so blind as to be unable to read the communications of his ministers. Averse to remain in London, where his infirmity would be more exposed to public observation, the king resolved to reside at Windsor. This rendered the appointment of a private secretary absolutely necessary.

Private secretary to the king.

<sup>1</sup> Torrens, *Life of Melbourne*, v. 2, p. 367.

<sup>2</sup> May, *Const. Hist.* v. 1, p. 131; and Martineau, *Life of the Prince Consort*, v. 1, pp. 36, 105. The way in which the new principle was applied to the ladies of the household upon the change of ministry in 1841 is described in Stockmar's *Mem.* v. 2, p. 50; and see Amos, *Fifty Years' Eng. Const.* p. 234.

<sup>3</sup> *Guardian*, July 18, 1866, p. 761. It is usual for the sovereign's choice of persons to serve as lords of the bedchamber to be approved of by the prime minister, when the selection is made from friends of the party in power. Grey, *Corresp. with William IV.* v. 1, pp. 26, 32, 33, 88. Once, in 1831, the king waived his right of nomination in favour of any one whom the premier might choose (*Ib.* p. 138).

Accordingly, on the recommendation of Mr. Pitt, Colonel Herbert Taylor was appointed to the office, with a salary of £2000 per annum, which was paid out of funds at the disposal of the crown, and never came under review in parliament. Colonel Taylor discharged the duties of this delicate and confidential office, until the commencement of the Regency, with such integrity, prudence, and reserve, as to shield himself from every shadow of complaint. Nevertheless, the appointment itself was viewed with disfavour by many leading men in Parliament, who only refrained from calling it in question from motives of delicacy towards the afflicted monarch.<sup>1</sup> When the Prince of Wales was called to the Regency (in December, 1810), he appointed his friend Colonel M'Mahon, who was at the time a member of the House of Commons, to be his private secretary and keeper of the privy purse, with the same salary as his predecessor, but with the important difference that it was to be paid by the Treasury, thereby rendering Colonel M'Mahon a public officer. This transaction gave rise to an animated discussion in the House of Commons. After the *Official Gazette* had appeared, announcing the appointment, inquiries were made of ministers, on March 23, 1812, as to the facts of the case; and on April 14, Mr. C. W. Wynn moved for a copy of the appointment, for the purpose of founding upon it a resolution of censure, or a declaration of the inutility of the office. Mr. Wynn urged that the appointment was wholly unprecedented, except in the case of Colonel Taylor, which was purely a private affair, arising out of the king's infirmity; and that "it was a most unconstitutional proceeding to allow the secrets of the council to pass through a third person," thereby subjecting the advice of cabinet ministers to their sovereign "to the revision of his private secretary." Ministers opposed the motion, contending that the Prince Regent, who had not been trained to habits of business like his father, stood in need of the services of a private secretary to assist him in his private correspondence, and to relieve the heavy manual labour which the immense amount of public business requiring the attention of the crown unavoidably entailed. This office, moreover, was not one of responsibility and would not encroach upon

<sup>1</sup> *Parl. D. v. 22*, pp. 121, 342, 361; Jesse, *Life of George III. v. 3*, p. 439.

the province or responsibility of any minister. Ministers of the crown would still be the legal and constitutional organs through which all the public business must be transacted. On a division Mr. Wynn's motion was negatived, by a majority of 76. The Opposition, however, determined to renew the attack, on the special ground that the appointment, unlike that of Colonel Taylor, had been made a public one. But, on June 15, Lord Castlereagh informed the House that the Prince Regent had been pleased to direct that Colonel M'Mahon's salary should be paid out of his privy purse. The Opposition then agreed to let the matter drop; and Colonel M'Mahon continued to hold the office until his death, in 1817,<sup>1</sup> when Sir B. Bloomfield was appointed private secretary. He was replaced, in 1822, by Sir Wm. Knighton, who retained the office until the king's death, in 1830.<sup>2</sup>

Sir Herbert Taylor, the faithful secretary of George III., was reappointed to this office by William IV., in Sir Herbert Taylor's succession to Sir W. Knighton. We have the testimony of Lord Aberdeen, when prime minister, that no objection was made to these appointments, notwithstanding that "these men must of necessity have known and were able to have given advice, or to have disclosed everything, if they

<sup>1</sup> *Parl. D.* v. 23, p. 476; *Ann. Reg.* 1817, p. 147; Sir B. C. Brodie's *Works*, v. 1, p. 77; *Ed. Rev.* v. 136, p. 395.

<sup>2</sup> Colonel M'Mahon was made a privy councillor in 1812, and Sir B. Bloomfield in 1817 (Haydn, *Book of Dignities*, pp. 140, 141). But this was afterwards admitted to have been a mistake, "for in fact it gave authority and consequence, where confidence to any degree may be placed, but where authority and consequence ought not to exist." Accordingly, in 1823, when George IV. wished to admit Sir W. Knighton into the privy council, it was opposed by Lord Liverpool (the premier), as being "most objectionable in principle and precedent." His lordship cited the opinion of George III., "who understood these matters better than any one," that the king's private secretary "should be put upon exactly the footing of an under-secretary of state"—a functionary who is "never a privy councillor, although necessarily he knows more of the secrets of government than any cabinet minister, except his principal and the first minister. These arguments prevailed, and the matter was allowed to drop (*Welln. Desp.* 3rd ser. v. 2, pp. 103-105; and see the Duke of Wellington's advice to Sir W. Knighton, in *Greville Mem.* v. 1, p. 73). [A contrary practice has lately prevailed, Sir Henry Ponsonby, who fills the office of private secretary to the queen, being a member of the privy council. But then it should be added—in reference to George III.'s opinion—that under-secretaries of state are now also occasionally made privy councillors.—*Editor.*]

had thought fit, although neither of them was a privy councillor."<sup>1</sup> On one occasion, William IV. made his private secretary the medium of giving expression to his wishes to certain peers, in regard to their conduct upon a great public question, in a very irregular manner;<sup>2</sup> but this communication was made with the knowledge and consent of the prime minister.<sup>3</sup>

Upon the accession of Queen Victoria it was determined that no private secretary should be assigned to her, lest the influence of such an officer over a youthful and inexperienced sovereign should prove prejudicial to the state. But Lord Melbourne, who was then first minister of the crown, undertook to act also as her Majesty's private secretary. The assumption by the prime minister of such a position towards the queen, in any circumstances, was characterized by Lord Aberdeen as an "unconstitutional" proceeding;<sup>4</sup> being calculated to impair the free exercise of the royal judgment, under the plausible pretext of assisting the sovereign in the performance of her onerous functions. But we are safe in concluding that no such intention influenced Lord Melbourne upon this occasion, and that his sole desire was to afford to his royal mistress, in her youth and inexperience, the benefit of his matured acquaintance with the routine of government.<sup>5</sup> After her Majesty's marriage with Prince Albert, his Royal Highness, with the sanction of the ministers of the crown, assumed the duties of the queen's private secretary; although, in consideration of his rank and station, he had been made a privy councillor. He acquitted himself of the duties which thus devolved upon him to the admiration of all parties. Subsequent to the great loss which her Majesty sustained in the premature decease of her lamented consort, several gentlemen in succession were

Her Majesty's  
private secre-  
tary.

Prince Albert  
as the queen's  
private secre-  
tary.

<sup>1</sup> *Hans. D.* v. 130, p. 96; and see Nicolas, Pref. to *Proc. Privy Coun.* v. 6, p. 134, n.

<sup>2</sup> His Majesty, through Sir Herbert Taylor, asked the opposition peers to cease from any further opposition to the Reform Bill.

<sup>3</sup> See Lord Grey, *Corresp. with William IV.* v. 2, pp. 439-452.

<sup>4</sup> *Hans. D.* v. 130, p. 96.

<sup>5</sup> [It was Lord Melbourne's deliberate judgment that the queen should not have a private secretary (*Life of Lord J. Russell*, v. 1, p. 284, n.). —Editor.]

appointed as her private secretary.<sup>1</sup> Of late years no constitutional objection has been urged to the continuance of this office ; and it is clear that the great and increasing amount of routine duty devolving upon an English sovereign at the present day, as well as a consideration of the altered position of the crown towards the members of the administration since the establishment of parliamentary government, alike justify and require the appointment.

Right of the sovereign to employ a private secretary.

3. The position of a queen consort has been ascertained by the laws and customs of the realm. She has her own privileges and rights. She has important duties to perform as head of the court, in maintaining its dignity and respectability ; and by her example and authority she is enabled to exercise a direct influence over the manners of society, and especially of the female portion of it. But the constitution has assigned no definite place to the husband of a reigning queen. The only precedent in modern English history, until the accession of Queen Victoria, of this peculiar and difficult position is that of Prince George of Denmark, the husband of Queen Anne ; but this Prince was destitute of the ability and strength of character which should have made him an active and efficient helpmate to his wife and sovereign.<sup>2</sup> It was reserved for Prince Albert, by the rare combination of admirable qualities with which he was endowed, to create for himself a position of pre-eminent usefulness, without trenching in the slightest degree upon the limits within which, as the husband of his sovereign, he was necessarily confined. His marriage to Queen Victoria took place on February 10, 1840. On March 5, the queen conferred upon him place and precedence next to herself, and on September 11 following, seven months after his marriage, and a few days after the completion of his twenty-first year, he was introduced, by her Majesty's command, to the Privy Council, and took his seat at the board, which he never afterwards failed to attend.

Prince Consort.

Character and conduct of Prince Albert.

His royal highness was not a member of the House of

<sup>1</sup> Viz. Sir T. M. Biddulph and Lt.-Gen. the Hon. Charles Grey. Upon the death of Gen. Grey, in April, 1870, Col. Ponsonby was gazetted to this office.

<sup>2</sup> *Ed. Rev.* v. 115, p. 211.

Peers, and had therefore no place formally assigned to him for the public expression of his personal opinions upon political questions. In this respect his position was analogous to that of the queen herself. As the consort of his sovereign, he was in fact her *alter ego*; and it was in this capacity, not merely from his being a member of the Privy Council, that he was constitutionally empowered to attend at every conference between the queen and her ministers.<sup>1</sup> Generally present at such times, he always took part in the discussions with tact, ability, and discretion. It was not until July 2, 1857, that the title and dignity of prince consort were granted to him by royal letters patent.<sup>2</sup>

We now proceed to define, more particularly, the constitutional position of the British sovereign. We have already seen that, in a system of parliamentary government, as it is administered in England, the personal will of the monarch can only find public expression through official channels, or in the performance of acts of state which have been advised or approved by responsible ministers; and that the responsible servants of the crown are entitled to advise the sovereign in every instance wherein the royal authority is to be exercised. In other words, the public authority of the crown in England is exercised only in acts of representation, or through the medium of ministers, who are responsible to parliament for every public act of their sovereign, as well as for the general policy of the government which they have been called upon to administer. This has been termed the theory of Royal Impersonality. But the impersonality of the crown only extends to direct acts of government. The sovereign retains full discretionary powers for deliberating and determining upon every recommendation which is tendered for the royal sanction by the ministers of the crown; and, as every important act of administration must be submitted for the approval of the crown, the sovereign is thus enabled to exercise influence and control over the government of the country. In

<sup>1</sup> *Ld. Chief Justice Campbell*, in *Hans. D.* v. 130, p. 105; *Stockmar's Mem.* v. 2, pp. 492-498.

<sup>2</sup> So early as 1841, the queen expressed her desire that the title of king consort should be conferred upon the prince, but after consulting her ministers this idea was abandoned (*Martin's Pr. Consort*, v. 1, p. 257).



the gradual but almost entire transformation which the kingly office has undergone, since the substitution of parliamentary for personal government, the functions of royalty are still vital if less conspicuous than before. They are now chiefly fulfilled in the exercise of a direct and personal influence in the whole work of government.<sup>1</sup>

In the fulfilment of the functions of royalty, much must always depend upon the capacity and personal character of the reigning monarch. The sovereign "should be, if possible, the best-informed person in the empire, as to the progress of political events and the current of political opinion both at home and abroad." "Ministries change, and when they go out of office lose the means of access to the best information which they had formerly at command. The sovereign remains, and to him this information is always open. The most patriotic minister has to think of his party. His judgment, therefore, is often insensibly warped by party considerations. Not so the constitutional sovereign, who is exposed to no such disturbing agency. As the permanent head of the nation, he has only to consider what is best for its welfare and its honour; and his accumulated knowledge and experience, and his calm and practised judgment, are always available in council to the ministry for the time, without distinction of party."<sup>2</sup>

But, in order to discharge his functions aright, it is indispensable that the sovereign should be ready and willing to labour, zealously and unremittingly, in <sup>Duty of a</sup> sovereign. his high vocation; otherwise he will be unable to cope with the multifarious and perplexing details of government, or to exercise that controlling power over state affairs which properly appertains to the crown. On the other hand, a sovereign who, from whatever cause, is indifferent to the exercise of his kingly functions, may neglect the administrative part of his duties, and, if he be served by competent ministers, the commonwealth will suffer no immediate damage. But, in such a case, the legitimate influence of the monarchical element

<sup>1</sup> See Mr. Gladstone, in *Cont. Rev.* v. 26, pp. 10-15.

<sup>2</sup> Prince Albert's words, quoted in Martin's *Pr. Consort*, v. 2, p. 159; and see *Ib.* p. 300; Mr. Disraeli's speech at Manchester, April 3, 1872. See also, on the advantages derivable from the experience of a sagacious king, Bagehot, on the *Eng. Const.* pp. 103-109.

in the constitution is impaired, and is rendered liable to permanent deprivation.<sup>1</sup>

It need scarcely be urged that the possession of a high personal character and a cultivated intellect are of vital consequence to the sovereign, to fit him for his rightful position in the inner councils of the state. Therein, the king must be regarded as, in fact, the permanent president of his ministerial council. Should such a necessity unfortunately arise, a prudent and sagacious monarch—while unable to impose his personal views upon his ministers, or to shape a policy for their guidance—can do much to moderate party asperities, rebuke selfish and unworthy aims, and encourage patriotism, by bringing to bear upon his ministers a healthy moral influence, similar to that which proceeds from an enlightened public opinion.

On the wider field of national and non-political pursuits, wherein the individuality of the sovereign is equally excluded from direct interference, the moral influence of the crown, as a means of promoting the public welfare, is of incalculable weight and value. It properly devolves upon the constitutional sovereigns of England to employ this powerful influence for the encouragement of public and private morality, for the advancement of learning, and for the diffusion of civilization among their people.<sup>2</sup> The favour of the monarch is always an object of honourable ambition, and, when worthily bestowed, will nerve the arm and excite the brain to deeds which deserve a nation's gratitude, and bring renown upon the whole empire.

With such advantages resulting from monarchical rule, it were vain to imagine that, because the direct interference of the crown in acts of government is forbidden by the spirit of the constitution, royalty has ceased to be anything but an empty phantom or a costly

Importance of  
the kingly  
office.

<sup>1</sup> See Bagehot, pp. 112-116.

<sup>2</sup> See Harris on *Civilization*, pp. 291-294. Thus, upon the occurrence of a frightful catastrophe to a female performer on the tight-rope, at Aston Park, near Birmingham, Sir C. B. Phipps, by command of the queen, wrote to the Mayor of Birmingham, on July 25, 1863, to express her Majesty's desire that he would use his influence to prevent in future such demoralizing exhibitions in a place intended for the healthy exercise and rational recreation of the people (see the letter with the Mayor's reply in the *Ann. Reg.* 1863, *Chron.* p. 122). This "personal and direct rebuke" by her Majesty led, we are told, to "the instant destruction of Blondinism" in Great Britain (*Vict. Mag.* v. 29, p. 229; and see Louis Blanc's *Letters on England*, 2nd ser. v. 1, p. 271; and *Hans. D.* v. 211, p. 1733).

pageant. Though divested, by the growth and development of our political institutions, of direct political power, the crown still retains immense personal and social influence for good or evil.

One of the most important branches of the regal functions is that wherein the crown, as "the symbol of national sovereignty," appears in public for the performance of those acts of state which peculiarly appertain to the kingly office—such as opening and proroguing Parliament, holding public receptions, or ceremonials for conferring marks of distinction and royal favour upon particular persons, and according, on behalf of the nation, a hospitable welcome to foreign sovereigns, or other eminent persons from abroad, who may visit the kingdom. These duties, while they frequently entail heavy burdens upon the sovereign, cannot be intermitted—except for unavoidable causes, and for a limited time—without impairing the dignity and influence of the crown itself. The presence of the sovereign in the midst of his people, dispensing favours, or engaged in the performance of high acts of state, affords opportunity for the public expression of the loyalty or personal devotion of the people to their king. For "loyalty needs to be stimulated by external display, by the pomp and circumstance of power, by all the kindly feelings which personal intercourse creates between sovereign and subject. If a sovereign omits to keep it alive by such means, he leaves unfulfilled that one function which no one else can perform in his stead."<sup>1</sup>

Moreover, notwithstanding the supreme political power which is concentrated in the hands of the prime minister for the time being, the court, presided over by the sovereign, is still the highest point in the social scale. No prime minister, or leader of a political party, can attempt to vie with his sovereign in this particular. The personal pre-eminence of the king invests himself and his surroundings with a dignity which is absolute and unapproachable. The most exalted position in English society is thereby withdrawn from the arena of political competition, which is an immense benefit to the best interests of the nation. Were it otherwise, "politics would offer a prize too dazzling for mankind." If, in addition to the advantages that at present attend upon a

<sup>1</sup> *Sat. Rev.* March 26, 1864.

successful parliamentary career, "the highest social rank was to be scrambled for in the House of Commons, the number of social adventurers there would be incalculably more numerous, and indefinitely more eager;" and an overwhelming preponderance would be given to a force which is "already perilously great."<sup>1</sup> From all these disturbing influences, our political system has been preserved by the position assigned therein to the monarch. The court of our sovereign is therefore an important element in the forces whereby the legitimate influences of royalty make themselves felt in the body politic; and if the favour and hospitalities of the court are beneficially dispensed—and its recreations becomingly directed into moral and healthful channels—the social and moral tone of the upper classes, and, by their example, of the whole community, are proportionably elevated.<sup>2</sup>

The influence which properly appertains to the opinions of the sovereign, when constitutionally expressed, would naturally be exerted to place the government of the country in the hands of a minister whose policy was in accordance with the views entertained by the crown itself; but unless those views found a response from the nation at large, and were accepted by Parliament, they could not ultimately prevail. For "the greater part of the power still practically retained by the crown depends upon the influence it can exercise on individual statesmen, and through them on the dominant party of the day." In the last resort, no opinions or policy can be carried out by the government of England but such as meet with the sober approval of parliament and of the people.

<sup>1</sup> Bagehot, *Eng. Const.* p. 73.

<sup>2</sup> See Mr. Gladstone on this subject in *Cont. Rev.* v. 26, p. 13, and in the *Church Quar. Rev.* v. 3, p. 487. And see a well-written "Letter to the Queen, on her Retirement from Public Life: by one of her Majesty's most Loyal Subjects" (London, 1875).

## CHAPTER II.

## THE PREROGATIVE OF THE CROWN, AND THE PRIVILEGE OF PARLIAMENT.

THE term "prerogative" may be defined as expressing those political powers which are inherent in the crown, <sup>Prerogative defined.</sup> and that have not been conferred by Act of Parliament, and which accordingly continue within the competency of the sovereign, except in so far as they have been modified or restrained by positive legislation.<sup>1</sup> For the king's prerogative is a part of the law of the realm, and hath bounds set unto it by the laws of England.<sup>2</sup> All that is meant by prerogative, however, nowadays is, "the practical division which it is necessary to make between the duties of the executive and the duties of the legislative power."<sup>3</sup>

The prerogatives of the sovereign of Great Britain are of vast extent and paramount importance. In the crown is centred the whole executive power of the empire, the functions appertaining to the administration of government, and supreme authority in all matters—civil, judicial, military, and ecclesiastical.

The king is, moreover, the head of the legislature, of which he forms an essential constituent part; the generalissimo, or first in command, of the naval and military forces of the state; the fountain of honour and of justice, and the dispenser of mercy, having a right to pardon all convicted criminals; the supreme

<sup>1</sup> Cox, *Inst.* p. 592; and see Lord Cairns' speeches on the Army Regulation Bill, *Hans. D.* v. 208, p. 520; and on the Irish Peerage, *ib.* v. 225, p. 1214. [The word "prerogative" is simply a synonym for privilege. It is customary to talk of the prerogative of the crown and the privilege of parliament, but it would be just as accurate to speak of the privilege of the crown and the prerogative of parliament.—*Editor.*]

<sup>2</sup> Coke, 3 *St. Tri.* p. 68.

<sup>3</sup> Mr. Gladstone, *Hans. D.* v. 214, p. 476; and see *Law. Mag.* 4th ser. v. 8, pp. 260-275.

governor, on earth, of the national church ; and the representative of the majesty of the realm abroad, with power to declare war, to make peace, and to enter into treaty engagements with foreign countries.

It is beside the object of the present writer to consider the prerogatives of the crown in their legal aspect ; for information on this subject the treatises of Chitty and Bowyer on Prerogative must be consulted. The present inquiry is confined to an investigation of the prerogative from a constitutional point of view, in reference more particularly to the legitimate control of parliament over the exercise of the same on the part of ministers of state.

For it must be observed, of all the royal prerogatives, that they are held in trust for the benefit of the whole nation, and must be exercised in conformity with the constitutional maxim, which requires that every act of the royal authority should be performed by the advice of councillors who are responsible to parliament, and to the law of the land.<sup>1</sup> This responsibility is now acknowledged to be thorough and complete ; and as no public act of the sovereign is valid which is not performed under the advice of some responsible minister, so, on the other hand, for every exercise of the royal authority ministers must be prepared to account to parliament, justifying it, if need be, at their own peril.

From the high and commanding position occupied by the sovereign, it would be natural to infer that he should be free to secure the services of the wisest and ablest men as his advisers. Accordingly the British Constitution distinctly recognizes his right to make choice of all his responsible ministers.<sup>2</sup> Lord Brougham asserts that it is the "unquestionable power of the crown to choose and to change its servants ;" and that "no one would think of questioning the foundation of this power, of objecting to its existence, or of wishing to restrict it," provided only that it is exercised "on grounds capable of being stated and defended." The grounds upon which the sovereign

Responsibility  
of ministers for  
every exercise  
of the  
prerogative.

Appointment of  
ministers by  
the crown ;  
their choice  
and dismissal.

<sup>1</sup> See *ante*, p. 81 ; Palmerston, *Hans. D.* v. 153, p. 1415.

<sup>2</sup> Hallam, *Const. Hist.* v. 3, p. 392 ; and see a resolution of the House of Lords, on Feb. 4, 1784.



may constitutionally dismiss a ministry he has thus defined: "If they exhibit internal dissensions amongst themselves; if they differ from the sovereign, or from the country at large [upon a question of public policy]; if their measures are ruinous to the interests of the country, at home or abroad; or if there should exist a general feeling of distrust and disapprobation of them throughout the country."<sup>1</sup>

Furthermore, as observed by Mr. Pitt, "the sovereign exercises his opinion on the sentiments as well as capacity of his ministers; and if upon either he judges them to be incompetent, or in any degree unfit, it is the prerogative and, with perfect loyalty let me add, the duty of the crown to dismiss such ministers."<sup>2</sup> For "the king cannot be required to take advice from men in whom he cannot confide; and, were there no other reason, a diminution of confidence is a sufficient ground for a change in his Majesty's councils."<sup>3</sup> But these abstract considerations are modified and restrained by the necessity for obtaining the approval of parliament to the choice of ministers by the crown. For constitutional usage requires that the sovereign shall not exercise his undoubted right of dismissing his ministers from mere personal motives, but solely in the interests of the state, and on grounds which can be justified to parliament.

It is the undeniable right of either House of Parliament to advise the crown upon the exercise of this or any other of its prerogatives. It has been contended, indeed, that "it is the right and privilege of the House of Commons to express its opinion and judgment, and even to offer advice to the sovereign, as to the circumstances, and the mode in which, he may have been advised to exercise his undoubted prerogative of choosing the ministers of the crown."<sup>4</sup> But such an interference with the free choice of the sovereign would be justifiable only in the extreme case, if we may suppose that such could occur, wherein the crown had selected unfit or improper

Advice of Parliament on the appointment of ministers.

<sup>1</sup> *Mir. of Parl.* 1835, pp. 28, 29; and see May, *Const. Hist.* v. 1, p. 122.

<sup>2</sup> *Parl. Hist.* v. 35, p. 1121.

<sup>3</sup> Ld. Selkirk, *Parl. D.* v. 9, p. 377. See Mr. Gladstone's comments upon the dismissal of the Melbourne Ministry, in 1834, by William IV. (*Gleanings of the Past Years*, v. 1, p. 231).

<sup>4</sup> Lds. Morpeth and Stanley, *Mir. of Parl.* 1835, p. 74.

persons as its advisers.<sup>1</sup> In all ordinary circumstances, the ministers chosen by the sovereign are entitled to receive from parliament, if not "an implicit confidence," at the least "a fair trial."<sup>2</sup>

King's ministers entitled to a fair trial.

Having vindicated the right of the sovereign to the free choice of his constitutional advisers, by whom the administration of the government is to be conducted, it remains to be seen to what extent the sovereign is at liberty to exercise his personal inclinations in the choice or dismissal of individual ministers.

Personal inclinations of the sovereign in the formation of a ministry.

Theoretically, it is presumed that the sovereign acts in this matter according to his own discretion. William III. allowed no interference with his own will in appointing whom he would to fill the high offices of state;<sup>3</sup> but the necessities of parliamentary government, coupled with the inferior capability of his immediate successors upon the throne, soon entangled the reigning monarch in the meshes of party, and deprived him of free agency, even in the choice of his own ministers.

From the accession of the House of Hanover until at least the year 1812, it appears to have been a fundamental article of the Whig creed that the ministers of the crown, and especially the prime minister, should be nominated by the chiefs of their own party, when in power; and that the choice of the sovereign, in regard to his ministers generally, should be limited to the members of certain leading aristocratic families. In this they were partially successful, the earlier sovereigns of this dynasty being unable to resist the strength of the party by whom this claim was set up. But George III., immediately upon his accession, endeavoured to free himself from such trammels, and to break down the great Whig oligarchy. As a matter of compromise, he succeeded in making good his right to appoint a portion of every administration, whilst the remainder were nominated

Nomination of ministers by the crown.

<sup>1</sup> Ld. Selkirk's speech, *Parl. D.* v. 9, p. 377; and see Adolphus, *Hist. of Eng.* v. 3, p. 466, n.

<sup>2</sup> Sir R. Peel's *Mem.* v. 2, p. 67; *Hans. D.* v. 191, p. 1728. [Ministers, however, who do not presumably enjoy the confidence of the House of Commons have no right to a fair trial except on the issue whether they do or do not enjoy such confidence.—*Editor.*]

<sup>3</sup> Macaulay, *Hist. of Eng. passim.*

by the leading statesmen who were invited to join the same.<sup>1</sup> This arrangement appears to have continued in operation until after the accession of William IV.

It is only since the accession of George IV. that the unrestricted choice of the crown in the selection of the prime minister himself has been freely admitted by all parties in the state; but it is now universally conceded that the prime minister—as the minister in whom the crown has placed its constitutional confidence, and who is responsible to his sovereign for the government of the whole empire—should be the free and unbiased choice of the crown itself. In 1827, as we have seen,<sup>2</sup>

Free choice of  
the prime  
minister by the  
crown.

<sup>1</sup> In 1778, in view of the proposed retirement of Lord North, we find George III. stipulating in regard to the *personnel* of the incoming administration (Fitzmaurice, *Life of Ld. Shelburne*, v. 3, p. 20).

In 1782, George III. was allowed to nominate Lord Thurlow as Lord Chancellor and a member of the cabinet, whilst the Shelburne and Rockingham parties introduced five members each (*Parl. D.* v. 23, p. 413).

During Mr. Pitt's administration, the king, who had great confidence in that statesman, did not interfere at all in his arrangement of the political offices, though in regard to some of them he privately expressed his extreme disapprobation (Rose, *Corresp.* v. 2, pp. 158, 175).

During the Regency, in 1812, the negotiations with Lords Grey and Grenville for the reconstruction of the ministry fell through, because the Prince Regent claimed the right to nominate three members of the cabinet (including the prime minister) himself. This claim was objected to by the Whig lords, not as being unconstitutional, but because they deemed it to be opposed to the spirit of mutual confidence and freedom from suspicion which ought to characterize the cabinet council, and which rendered it essential that parties invited to co-operate in forming an administration should be at liberty to arrange its *personnel* amongst themselves (*Parl. D.* v. 23, p. 428).

In 1827, when George IV. accepted Canning as the head of a coalition ministry, he imagined that he would be able to exercise, more directly than before, personal influence and control in nominations to office. This led him to propose Herries as chancellor of the exchequer, and though Canning made no objection to the choice, Lord Lansdowne (with others of his colleagues) demurred to this departure from constitutional usage, and tendered his resignation. The king became alarmed. He consulted the Duke of Wellington, who told him that the choice of a first minister must be the king's own act; that "it was the only personal act the king of England had to perform; and that, when he had appointed his first minister, all the rest devolved upon the person so appointed, who became responsible for the king's act." Finally his Majesty yielded the point, and induced Lord Lansdowne to remain in office (Torrens, *Life of Melbourne*, v. 1, p. 233; *Colchester's Diary*, v. 3, p. 501).

<sup>2</sup> See note 1, *supra*.

the Duke of Wellington declared that this was the sole act of personal government now exercised by the king. And in 1845, Sir Robert Peel said, in explaining the particulars of his resignation of office: "I offered no opinion as to the choice of a successor. That is almost the only act which is the personal act of the sovereign; it is for the sovereign to determine in whom her confidence shall be placed."<sup>1</sup>

But while the doctrine is now fully established, that the sovereign has a free choice in the appointment of the prime minister, the selection of that functionary is nevertheless practically limited by the all-important fact, that no minister can, for any length of time, carry on the government of the country who does not possess the confidence of parliament, and more especially of the House of Commons. This circumstance has contributed to restrain the undue exercise of the prerogative of the crown to choose or change its responsible advisers, at discretion, and to compel the crown, in all its dealings with an administration, to govern itself by considerations of high political expediency.<sup>2</sup> Ample security, moreover, that no changes of ministry will be effected by the authority of the crown but such as would commend themselves to the judgment of parliament, is obtained by the operation of the constitutional rule which requires that, whenever a change of ministry takes place in consequence of an act of the crown, the incoming ministers shall be held responsible to parliament for the policy which occasioned the retirement of their predecessors in office.<sup>3</sup>

<sup>1</sup> *Hans. D.* v. 83, p. 1004. See also *Ld. Derby, Ib.* v. 123, p. 1701; *Mr. Disraeli, Ib.* v. 214, p. 1943; and *Massey's George III.* v. 3, p. 213.

<sup>2</sup> See *Martin's Pr. Consort*, v. 1, p. 110; and *Prince Albert's opinion*, quoted by Lord Russell, in *Hans. D.* v. 165, p. 44.

<sup>3</sup> *Grey, Parl. Govt.* 189, n.; *Hearn, Govt. of Eng.* p. 98; *Ld. Brougham, in Mir. of Parl.* 1835, p. 25; and see *ante*, p. 73. This principle was first recognized by Mr. Pitt in 1783, when he accepted office upon the dismissal of the Portland administration.

It was qualified by Mr. Perceval, in 1807, who, while admitting that every act of the crown must be vouched for by a responsible minister, nevertheless contended that, in the interim between successive ministries, the action of the crown was necessarily independent; and that whatever then took place was beyond parliamentary criticism or censure (*Hans. D.* v. 246, p. 253); but it was even then emphatically asserted, by the best

Upon the resignation or dismissal of a ministry, it is customary for the sovereign to send for the recognized leader of the opposition, or for some other person of known weight and influence in either House of Parliament, who is capable of leading successfully the political party to which he belongs, and to authorize him to undertake the formation of a new administration. It is not essential, however, that the person selected to bring about the construction of a new cabinet should be the intended prime minister. It may be difficult at first to fix upon any one suitable for this office with whom a new administration could be induced to co-operate. In such circumstances some less prominent person could be chosen to negotiate for the formation of the ministry.<sup>1</sup>

Formation of a new ministry.

We have already seen that it has of late years become a settled principle that the political chiefs to whom the sovereign may confide the task of forming a ministry are at liberty to select the individuals to compose the same, and to submit their names for the royal approval. This privilege is indispensable to the successful working of our parliamentary system, and, after a long struggle, it has been conceded to every political party which may, in turn, acquire the pre-eminence.<sup>2</sup> It is a con-

Prime minister empowered to choose his colleagues.

parliamentary authorities; "that there was not a moment in the king's life, from his accession to his demise, when there was not a person constitutionally responsible for his actions;" and this doctrine was distinctly affirmed, in 1835, when Sir R. Peel took office and boldly avowed his constitutional responsibility "for the dissolution of the preceding government, although he had not the remotest concern in it" (Peel's *Mem.* v. 2, p. 31).

<sup>1</sup> In 1812, Lord Moira received a commission of this kind from the Prince Regent, with the understanding that he should receive some inferior office, together with a seat in the cabinet (see the Duke of Wellington's remarks on this point, in *Hans. D. N.S.* v. 17, p. 464; and in *Well. Desp.* 3rd ser. v. 3, pp. 636-642; v. 4, pp. 3, 17, 22); and in 1859, upon the resignation of the Derby ministry, the queen charged Lord Granville to form a ministry, upon the ground that "to make so marked a distinction as is implied in the choice of one or other as prime minister, of two statesmen, so full of years and honours as Lord Palmerston and Lord John Russell, would be a very invidious and unwelcome task." But Lord Granville failed in his endeavour; whereupon her Majesty commissioned Lord Palmerston to form a ministry.

<sup>2</sup> See Lewis, *Adminis.* p. 96. Mr. Canning's letter of 1827, in *Hans. D. N.S.* v. 17, p. 457; Duke of Wellington's letter of 1828, in Peel's

stitutional necessity that the first minister of the crown should be able to assume full personal responsibility before parliament for the appointment of every member of the administration. This he can only do when he has been empowered to advise the crown in regard to the selection of the persons who are to be associated with him in the functions of government. The sovereign has, indeed, an undoubted right to express his wishes in favour of the introduction or exclusion of particular persons, but by modern constitutional usage he has no authoritative voice in the selection of any one but the prime minister. It is true that, in this as in other matters, the expression of a strong personal feeling on the part of the crown may have great weight in excluding a person from office, or including him, at least for a time ; but even this consideration must ultimately yield to a regard for the public interests, and the sovereign must be prepared to accept as his advisers and officers of state those who have been chosen for such functions by the premier.<sup>1</sup> In like manner, in the event of

Sanction of the crown in appointment of a new minister.

a vacancy occurring in an administration, whether from ordinary circumstances, or as the unavoidable result of differences between individual members of the same, it is the duty of the prime minister to take the pleasure of the crown in regard to the appointment

*Mem. v. 1, p. 11 ; Sir R. Peel, Evidence, 285, Com<sup>e</sup>. on Official Salaries, in 1850 ; and see Mill, Rep. Govt. p. 96.*

<sup>1</sup> George III., it is notorious, had such a repugnance to Mr. Fox, that for a long time he absolutely refused to admit him into the cabinet (Stanhope, *Life of Pitt*, v. 4, p. 170 ; Jesse, *Life of George III.* v. 3, p. 365). In 1821, George IV. refused to allow the readmission of Mr. Canning into the cabinet, after the death of Queen Caroline, although he had retired therefrom a few months previously, solely on account of his objections to taking part in the proceedings against the queen (Yonge, *Life of Ld. Liverpool*, v. 3, pp. 142-150). In 1823, in deference to the wishes of the king, the claims of Mr. Huskisson to a seat in the cabinet were not pressed (*Well. Desp.* 3rd ser. v. 2, pp. 9, 132). In 1827, Mr. Herries was appointed Chancellor of the Exchequer, to please the king, instead of Lord Palmerston, who was the nominee of the premier (Lord Goderich). In 1828, when the Wellington ministry was about to be formed, George IV. gave a *carte blanche* for the selection of any persons who had heretofore been in his service, except Lord Grey, whom he objected to receive again into the cabinet (Peel's *Mem. v. 1, p. 12*). In 1835, William IV. stipulated that Lord Brougham, who was personally displeasing to his Majesty, should not be replaced in the office of Lord Chancellor (Howley, *Brit. Const.* p. 269 ; *Ann. Reg.* 1835, p. 237).



of some one selected by himself to fill the vacant office. And, as Lord Liverpool ventured to assure George IV., in a memorandum urging upon the king the propriety of accepting Mr. Canning as a cabinet minister, "the principle of exclusion has rarely been attempted without having the effect of lowering the crown and exalting the individual proscribed."<sup>1</sup>

If difficulties should occur in the formation of a ministry, it is always competent for the sovereign to send for, and take the advice of, any peer or privy councillor of weight and experience in public affairs, whose counsel he might consider would be serviceable to him in the emergency.<sup>2</sup>

The king consults peers on the formation of a ministry.

The sovereign never attends at meetings of the cabinet council. Previous to the accession of the present dynasty it was otherwise; and, so long as it was consistent with the practice of the constitution for the monarch to take an active and immediate part in the direction of public affairs, it was fitting that no meeting of the cabinet should be held without his presence. But,

Cabinet councils not attended by the sovereign.

<sup>1</sup> Yonge, *Life of Ld. Liverpool*, v. 3, p. 148.

<sup>2</sup> Thus George II. repeatedly availed himself of the advice of Sir Robert Walpole, upon state emergencies, after the retirement of Walpole from public life (Ewald's *Life of Walpole*, p. 442). In 1812, upon the crisis arising out of the assassination of Mr. Perceval, when it became necessary to reconstruct the cabinet of which he was the chief, the Prince Regent applied for and acted upon the advice of his brother, the Duke of Cumberland (Campbell's *Chanc.* v. 7, p. 280). In 1827, during the interregnum occasioned by the break-up of the Liverpool Administration, on account of the death of the premier, and the delay in the formation of a new ministry by Mr. Canning, the Duke of Newcastle used his privilege as a peer to obtain an audience of the king, at which he threatened the withdrawal of the support of the Tory party from the government if his Majesty should select Mr. Canning as prime minister (Stapleton's *Canning and his Times*, p. 582). Upon the resignation of the Russell ministry in 1851, after several ineffectual attempts on the part of various statesmen to form a new administration, her Majesty sent for the Duke of Wellington, not for the purpose of entrusting the making of a cabinet to his hands, but in order that she might take counsel from him in regard to the existing state of affairs, determining also "to pause awhile before she again commenced the task of forming an administration" (*Hans. D.* v. 114, pp. 1033, 1075). Again, in 1852, upon the resignation of the Derby ministry, and in 1855, after the resignation of Lord Aberdeen, her Majesty sent for the Marquis of Lansdowne for a similar purpose (*Ib.* v. 123, p. 1702; Martin's *Pr. Consort*, v. 3, p. 205). [But compare the account of this last transaction in the *Life of Lord J. Russell*, vol. ii, p. 160.—*Editor.*]

under the existing system of government, through responsible ministers, it is obvious that in order to enable the cabinet to arrive at impartial conclusions upon any matter, it is necessary that their deliberations should be private and confidential.

The proper medium of communication between the sovereign and the administration collectively is the prime minister; not merely on account of his position as head of the government, but especially because he

The sovereign  
and the prime  
minister.

is the minister who has been personally selected by the sovereign as the one in whom the crown imposes its entire confidence. He is bound to keep the sovereign duly informed of all political events of importance, including the decisions of Parliament upon matters of public concern. Formal decisions of the cabinet upon questions of public policy are also submitted to the sovereign by the prime minister, upon whom it devolves to take the royal pleasure thereupon. Subordinate ministers, however, have the right of access to the sovereign and of direct communication with him, upon departmental business.

The mode in which ministers address the sovereign in epistolary communications is peculiar. It is the established etiquette for the minister to use the third person, and to address his sovereign in the second.<sup>1</sup>

Etiquette in  
writing to the  
sovereign.

When or by whom this epistolary form was introduced is unknown. Mr. Grenville's letters to George III., in 1765, are in the ordinary form.<sup>2</sup> But, twenty years later, we find Mr. Fox employing the phraseology which is now in use: "Mr. Fox has the honour of transmitting to your Majesty the minute of the cabinet council assembled this morning at Lord Rockingham's, 18th May, 1782."<sup>3</sup>

When it is necessary to obtain the royal sign-manual to any important document, the various secretaries and other ministers of state who may require it, in their respective departments, should make personal application for the same. But, if the paper to be signed be of an ordinary and unimportant character, it may be transmitted to the sovereign in a departmental despatch-box.<sup>4</sup> It is the duty of

Royal sign-  
manual.

<sup>1</sup> *Corresp. William IV. with Earl Grey*, v. 1, pp. xiii., 390; Lewis, *Adminis.* p. 34, n.

<sup>2</sup> *Grenville Papers*, v. 3, pp. 4-15.

<sup>3</sup> Russell's *Fox*, v. 1, p. 351; Stanhope's *Pitt*, v. 4, Appx. pp. i. n., xiii.

<sup>4</sup> *Hans. D.* v. 165, p. 841.

the Lord Chancellor to attend upon the sovereign in order to obtain the sign-manual for the sanction of bills that have passed the two Houses of Parliament.<sup>1</sup>

If at any time the sovereign should be unable, through physical infirmity, to append the royal sign-manual to the multifarious papers which require his signature, the intervention of Parliament must be invoked to give

Royal sign-manual, when dispensed with.

legal effect to the arrangements necessary in the circumstances.<sup>2</sup> In the last year of the reign of George IV., an Act was passed authorizing his Majesty to appoint one or more persons to affix the royal signature to papers, by means of a stamp, the state of the king's health being such as to render it painful and inconvenient for him to sign his own name.<sup>3</sup> And in 1862, with a view to relieve her Majesty from the excessive labour of signing every separate commission for officers of the army, marines, etc., after having already signed a "submission paper" authorizing the issue of such commission, an Act was passed empowering the queen in council to direct that the said commissions may be signed by the commander-in-chief and a secretary of state, and to dispense with the necessity for the royal signature being appended thereto.<sup>4</sup> The urgency for this relief will be apparent when it is stated that in 1862 her Majesty was signing commissions of 1858; and that, up to the time when an order in council was issued to permit the commander-in-chief and the secretary of state to sign on her behalf, there were 15,931 commissions remaining unsigned. These arrears were soon cleared off; but the queen still undertook to sign first commissions, and these had so accumulated, that, up to June 1, 1865, there were 4800 first commissions awaiting her signature. But arrangements were then made to prevent the recurrence of such delays.<sup>5</sup>

If circumstances should occur at any time that would render the personal exercise of the royal functions inconvenient or

<sup>1</sup> Campbell's *Chanc.* v. 7, pp. 157-159.

<sup>2</sup> See Clode, *Mil. Forces*, v. 2, p. 440.

<sup>3</sup> 11 George IV. & 1 William IV. c. 23; and see *Well. Desp.* Civil S. v. 7, pp. 9, 60-67.

<sup>4</sup> 25 Vict. c. 4. See the debates on this Bill, in *Hans. D.* v. 165, and *Ib.* v. 176, p. 2020.

<sup>5</sup> *Rep. Com. Pub. Accounts, Com. Pap.* 1865, v. 10; Evid. 2063-2065, 2118-2127; *Hans. D.* v. 180, p. 973.

impossible, the powers of the crown may be temporarily delegated to commissioners or other substitutes.

Delegation of  
royal func-  
tions.

Absence of  
sovereign from  
the realm.

The most general delegation by the crown of its political power has been that which has taken place from time to time in the appointment, by the sovereign, of Lords Justices and Guardians for the administration of the government during the absence of the sovereign from the realm. The powers granted to such persons have usually included every possible exercise of the royal authority, except that of assenting to bills in parliament, and of granting peerages. But it has been customary to accompany the commission by instructions, requiring the commissioners not to exercise certain of the powers granted (particularly those for the pardon of offenders and the dissolution of parliament) without special signification of the royal pleasure.

During the long reign of George III. the sovereign was never absent from England; and his son and successor, George IV., went abroad once only, in the year 1821, when Lords Justices were appointed by his Majesty in council. After the accession of the present queen, her Majesty, in the year 1843, paid a short visit to the King of the French at the Château d'Eu; and again, in 1845, visited Germany. Upon both these occasions, the opinion of the law-officers of the crown was taken, as to whether there was any legal necessity for the issue of a commission appointing Lords Justices during her Majesty's absence. Each time the law-officers were clearly of opinion that it was unnecessary. The question then resolved itself into one of expediency; and, considering the great facilities for speedy communication afforded by the general introduction of the railway system, and the circumstance that her Majesty would necessarily be accompanied by a responsible minister of the crown, and could therefore perform any royal act required of her with as much validity and effect on the continent of Europe as if it were done in her own dominions, the ministry decided that it was quite unnecessary to advise the appointment of Lords Justices, "really for no practical purpose."<sup>1</sup> Royal visits abroad have since been of no infrequent occurrence; and, as no appointment of Lords

<sup>1</sup> *Ld. Chanc. Lyndhurst*, in *Hans. D.* v. 82, p. 1514; *Mr. Disraeli*, *Ib.* v. 228, pp. 700, 882.

Justices has taken place upon such occasions, the practice may be considered to have fallen into desuetude.<sup>1</sup>

It is essential to the due execution of any powers by delegation from the crown, that a special authority, under the royal sign-manual, should be issued for the purpose. But, in 1788, a difficulty presented itself on this score, arising out of the melancholy condition of George III., who was first attacked by insanity at that time.

Royal functions  
in abeyance  
during illness  
of George III.

The mental disorder which afflicted the king was of such serious character, that it rendered it imperative upon parliament to take immediate steps to supply the defect in the royal authority for so long a period as the king's illness might continue. Parliament then stood prorogued for a particular day, upon which, in ordinary circumstances, it is probable that it would not have assembled. But, taking advantage of the authority of the royal proclamation, ministers determined to meet parliament without further delay, and deliberate upon the posture of affairs. After full inquiries had been instituted, by both Houses, into the state of his Majesty's health, they agreed to a resolution, that it was the right and duty of the Lords and Commons assembled in parliament to provide for the exercise of the royal authority, in such a manner as the exigency of the case might appear to require. It was then resolved by both Houses, that it was expedient and necessary that letters-patent for opening parliament should pass under the Great Seal. This was done accordingly; and, so far as was possible, in these painful and unprecedented circumstances, the usual forms for the opening of parliament were adhered to, notwithstanding the incapacity of the sovereign.<sup>2</sup> But, in the proceedings had upon this occasion, the two leading statesmen, Pitt and Fox, with their respective followers, were at issue. A succinct account of this memorable controversy will be found in May's *Constitutional History*.<sup>3</sup> It will suffice here to state the general results arrived at, so far as they establish an important point of constitutional law.

It was argued by Mr. Pitt, who was then prime minister, that in conformity with the principles established by the revo-

<sup>1</sup> Campbell's *Chanc.* v. 4, p. 125, n.

<sup>2</sup> *Parl. Hist.* v. 27, p. 653, *et seq.*

<sup>3</sup> Vol. i. pp. 146-162. See also Lewis, *Adminis.* p. 112.

lution of 1688, and by the Bill of Rights, the Lords and Commons represented the whole estates of the people, and were, therefore, legally as well as constitutionally, empowered to supply any deficiency in the kingly office, whensoever that should arise; that this assumption of power was not incompatible with the principle of an hereditary monarchy, but was essential as a safeguard of the throne itself against encroachment from any quarter. Having succeeded in obtaining the concurrence of Parliament to these conclusions, Mr. Pitt admitted that, as a matter of discretion, the Prince of Wales ought to be called upon to assume the regency, with all necessary authority, unrestrained by any permanent council, and with a free choice of his political servants. But he contended that any power which was not essential, and which might be employed to embarrass the exercise of the king's authority, in the event of his recovery, should be withheld. This was strenuously opposed by Fox, who maintained that the regent ought to possess the full authority and prerogatives of the crown, without any diminution. Parliament, however, agreed to the views propounded by Mr. Pitt, and the Prince of Wales consented to accept the regency upon these terms. The proposed restrictions upon the exercise of the regal authority by the prince were defined and embodied in a bill, which it was intended should be passed by both Houses, and receive the royal assent "by a commission to be ordered by the two Houses of Parliament, in the king's name." The bill actually passed the Commons; but, during its progress through the Lords, the king's convalescence was announced, and the bill was dropped.

In 1801 the king was threatened with a return of insanity, and the premier, Mr. Addington, had determined to follow the precedent established in 1788, when, happily, the king's recovery rendered any such proceedings unnecessary.<sup>1</sup> But in 1810 the king's malady again showed itself, this time destined to remain, and to terminate only with his life. Mr. Spencer Perceval was prime minister at this juncture, and he decided to adhere strictly to the precedent afforded by the proceedings in 1788, in every essential par-

Parliament to supply deficiency in kingly office when required.

Return of the king's malady.

<sup>1</sup> Pellew's *Life of Stamouth*, v. 1, p. 347.



particular.<sup>1</sup> The ministerial plan was warmly opposed in parliament, but was carried without alteration. The opposition did not then maintain that the Prince of Wales, as heir-apparent, succeeded of right to the regency during the king's incapacity. Mr. Lamb (afterwards Lord Melbourne)—upon the resolution that certain restrictions should be imposed upon the regent—moved an amendment, "That the entire royal power should be conferred upon him, without any restrictions." This amendment was negatived, by a majority of 224 to 200. Lord Brougham remarks upon these two precedents that they "have now settled the constitutional law and practice in this important particular."<sup>2</sup>

The pre-eminence of the king, by virtue of his prerogative, is such that he cannot be sued in any court, either civilly or criminally. Nevertheless, the law has provided a remedy for injuries proceeding from the crown which affect the rights of property; as where it is alleged that the crown is in wrongful possession of real or personal property to which the subject has a legal title, or of money which is due to the subject from the crown—either by way of debt or damages on breach of contract—and where there is an absence of an appropriate compulsory remedy against the crown.<sup>3</sup> It cannot be presumed that the crown would knowingly be a party to the injury of a subject, yet it might commit injustice by misinformation or inadvertency, through the medium of some responsible agent. It is therefore fitting that the subject should be authorized to represent to the sovereign, in a respectful manner, the nature of the alleged grievance, in order to enable a remedy to be applied. This remedy is by means of a Petition <sup>Petition of</sup> of Right, a mode of procedure the origin of which <sup>Right.</sup> has been traced back to the reign of Edward I., if not to Magna Carta itself.<sup>4</sup>

<sup>1</sup> Lewis, *Adminis.* p. 325; Walpole, *Life of Perceval*, v. 2, chs. v. and vi.

<sup>2</sup> *Sketches of Statesmen*, v. 1, p. 176.

<sup>3</sup> Att.-Gen. Palmer, *Hans. D.* v. 176, p. 2120; Thomas *v.* The Queen, *L. T. Rep.* N.S. v. 31, p. 439.

<sup>4</sup> *Inquiry as to Petitions of Right*, by A. Cutbill (London, 1874); and a treatise (privately printed) by Mr. Archibald, in the form of a letter addressed to Ch. Justice Bovill; Broom, *Const. Law*, pp. 241, 726 (*k*); Cox, *Eng. Govt.* p. 416. For the present procedure see Scott *v.* The Queen, in *Fost. and Fin. Nisi Prius Cases*, v. 2, p. 634; and *L. T.* v. 54, p. 109; Day, *Common Law Practice*.

The law in regard to Petitions of Right was amended and simplified in 1860, by the Act 23 & 24 Vict. c. 34; which was extended to Ireland in 1873 by the Act 36 & 37 Vict. c. 69. The object of this Act is to assimilate the procedure upon such petitions as much as possible to that which is adopted in cases between subject and subject, and to permit Petitions of Right to be entertained by any of the superior courts of law or equity at Westminster. It provides that any such petition shall be left with the secretary of state for the home department, in order that the same may be submitted for her Majesty's consideration. If she think fit, the queen will grant her fiat that right be done, when the merits of the suit will be investigated by the proper court, and judgment given according to law.<sup>1</sup>

It is a mistake to suppose that, whenever a Petition of Right is presented, the sovereign should be advised to write upon it *soit droit fait*, whatever may be its prayer, leaving it to the courts to decide whether it contains any grounds for relief. By the law and constitution of England a suit cannot be maintained against the sovereign, without the express consent of the crown. That consent cannot properly be withheld when sufficient foundation or *prima facie* groundwork for the claim put forth has, in the statement of facts on behalf of the petitioner, been adduced;<sup>2</sup> but it ought to be withheld, by advice of the attorney-general, where it is clear that no relief can be afforded. The attorney-general is answerable to parliament for the advice he may give as to the granting or withholding of a Petition of Right, in like manner as he would be in respect to the granting of a writ of error, or a *nolle prosequi*.<sup>3</sup>

It has been already stated, as a constitutional principle, that the personal actions of the sovereign, not being acts of government, are not under the cognizance of law; and that as an individual he is independent of, and not amenable to, any earthly power or jurisdiction. Some further remarks on this point may be appropriate. The

<sup>1</sup> See a return of all Petitions of Right on which her Majesty's fiat has issued under the Act 23 & 24 Vic. from 1860 to 1876, with the result in each case, *Com. Papers*, 1876, v. 61, p. 267.

<sup>2</sup> Broom's *Leg. Max.* p. 61, n.

<sup>3</sup> Campbell's *Chanc.* v. 7, p. 408, n.; and cf. *Hans. D.* v. 172, p. 1174; and *Tobin v. The Queen*, 16 *C.B. Rep.* N.S. p. 368.

best authorities have declared that there is no legal remedy obtainable by the subject for personal acts of tyranny and oppression on the part of the sovereign which have not been instigated by bad advisers, but have proceeded from the personal misconduct of the monarch himself. Should any such cases occur, so far as the ordinary course of law is concerned, they would be covered by the maxim which forbids the imputation of wrong to the sovereign,<sup>1</sup> and the erring prince must be left to the rebukes of his own conscience, and to his personal accountability to God alone. No decisions in regard to common criminal offences committed by any English king are to be found in the books; the jurists contending that the case of a sovereign being guilty of a common crime must be treated as the laws of Solon treated parricide,—it must be considered an impossibility.<sup>2</sup> It was truly observed by Locke, in his essay on *Government*, that the inconveniency of some particular mischiefs that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace and public security which result from the person of the chief magistrate being set out of reach of danger.<sup>3</sup>

Sovereign in his personal capacity not amenable to authority.

It would be unparliamentary to put questions to ministers of the crown, in either House, in regard to any personal acts or opinions of the sovereign, or of any of the royal family, for which ministers are not responsible.<sup>4</sup> In 1871, Mr. Gladstone replied to a question of this kind, under protest, and in order to disabuse the public mind of an erroneous impression.<sup>5</sup> And it is contrary to the usages of parliament to address the crown upon matters which have not been made matters of compact between the sovereign and parliament.<sup>6</sup>

Personal acts and opinions of sovereign and royal family not cognizable by parliament.

Questions relating to the discharge of public duties by the sovereign are not irregular, but they must be couched in respectful and parliamentary language.<sup>7</sup>

<sup>1</sup> Broom's *Leg. Max.* p. 63.

<sup>2</sup> Fischel, *Eng. Const.* p. 123.

<sup>3</sup> Book 2, section 205; and see Cox, *Eng. Govt.* pp. 408-416.

<sup>4</sup> *Mir. of Parl.* 1841, pp. 60, 78; and see Yonge, *Life of Ld. Liverpool*, v. 2, pp. 4, 5, 230-234; *Hans. D.* v. 217, pp. 1187, 1446; *ib.* v. 228, p. 1495.

<sup>5</sup> *Ib.* v. 204, p. 866.

<sup>6</sup> Mr. Gladstone, *Hans. D.* v. 206, p. 323; and see similar precedents in *Com. Papers*, 1868-9, v. 35, p. 959.

<sup>7</sup> *Hans. D.* v. 192, p. 711.

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The curious question, whether the sovereign is examinable as a witness, was raised in 1818, in the Berkeley peerage case, in reference to the Prince Regent. The crown lawyers were unanimous in their opinion that the reigning monarch could not, by any mode, give evidence as a witness in a civil suit.<sup>1</sup> On the other hand, it has been asserted by Lord Campbell, "that the sovereign, if so pleased, might be examined as a witness in any case, civil or criminal, but that he must be sworn; although there would be no temporal sanction to the oath," inasmuch as he is the fountain of justice, and no wrong may be imputed to him.<sup>2</sup>

The "civil list" which is granted by parliament for the support of the royal household, and for the maintenance of the dignity of the crown in England, has, ever since the accession of George III., been given in exchange for the hereditary revenues of the crown, which are all surrendered to parliament.<sup>3</sup> The civil list is settled anew upon the accession of every sovereign, and was fixed, in the case of Queen Victoria, at £385,000 per annum.<sup>4</sup> But more than one-third of this amount is allotted, by Act of Parliament, to defray salaries and superannuation allowances of the royal establishment. The sole remaining portions of the ancient estates of the crown which continue under the exclusive control of the royal family, are the Duchies of Lancaster and Cornwall. The former is a peculium of the queen, although the chancellorship of the duchy is considered as a political office. Parliament is annually informed of the revenues of the duchy, though the nett receipts are paid into the queen's privy purse.

The Duchy of Cornwall is the independent inheritance of the Prince of Wales, as heir-apparent, and only becomes the property of the crown when there is no heir-apparent of the throne.<sup>5</sup> Without denying the abstract right of parliament to

<sup>1</sup> See the opinion, in Yonge's *Life of Ld. Liverpool*, v. 2, pp. 369-375.

<sup>2</sup> *Lives of the Chancellors*, v. 2, p. 527.

<sup>3</sup> [The whole of the hereditary revenues of the crown were not surrendered till the reign of William IV. The revenues which the crown derives from the Duchy of Lancaster have never yet been surrendered.—*Editor.*]

<sup>4</sup> See May, *Const. Hist.* c. iv.

<sup>5</sup> See the *Crown Lands*, by J. W. Lyndon (London, 1871). As to the distinction between lands which have been assigned by the state for the

interfere with the disposal of the income arising from these royal duchies, it is not customary for the House of Commons to enter upon such inquiries.<sup>1</sup>

There are some other branches of the royal prerogative which may fitly engage our attention in the present chapter. They will naturally admit of the following classification : 1. The right of declaring war and making peace. 2. Intercourse with foreign powers. 3. The right of making treaties. 4. Interference in the internal concerns of foreign nations. Under each head the constitutional limits of parliamentary interference with the prerogative in question will be briefly stated.

Prerogative in relation to foreign powers.

1. The Constitution has vested the right of declaring war and making peace exclusively in the crown, to be exercised according to the discretion of the sovereign, as he may judge the honour and interests of the nation to require. But this, like all other prerogatives, must be exercised by the advice and upon the responsibility of ministers, who are accountable to parliament, and are liable to parliamentary censure or impeachment for the improper commencement, conduct, or conclusion of a war.<sup>2</sup>

Right of declaring war and making peace.

The previous consent of parliament, either to the commencement of a war or the conclusion of a peace, is not formally required by the Constitution. The necessity for obtaining adequate supplies for the prosecution of a contest with any foreign power, and the control possessed by parliament over the army and navy by means of the annual Mutiny Acts, coupled with the existence of ministerial responsibility, constitute a sufficiently powerful check against the improper use of this prerogative. Nevertheless, if the hostilities about to be

maintenance of the honour and dignity of the crown and estates which belong to the reigning sovereign, for the time being, as a private person, see Smith's *Parl. Remb.* 1862, p. 104. And see a discussion upon a bill to grant to her Majesty the enjoyment of Claremont House during her life or pleasure, *Hans. D.* v. 182, pp. 960-965, 1075; *Ib.* v. 183, pp. 423, 921; and Act 29 & 30 Vic. c. 62, sec. 30; *Com. Papers*, 1874, v. 35. For a history of all the ancient crown revenues, see *Com. Pap.* 1868-9, v. 35, pp. 915-961.

<sup>1</sup> *Hans. D.* v. 206, p. 323; v. 210, pp. 284-299.

<sup>2</sup> Cox, *Inst. Eng. Govt.* 596; Bowyer, *Const. Law*, 160; and see Amos, *Fifty Years of the Eng. Const.* p. 370.

entered into are likely to involve serious consequences, it would be the duty of ministers, before engaging therein, to summon parliament, to communicate to it the reasons for resorting to arms, and to ask for its advice and co-operation in carrying on the war.<sup>1</sup> If parliament be in session at the time, it is customary for a royal message to be sent down, announcing the commencement of hostilities; but this form has not been invariably observed.<sup>2</sup>

How far subject to parliamentary control.

The crown, in communicating to parliament the breaking out of hostilities, the existence of a state of war, or the commencement of negotiations for peace,<sup>3</sup> thereby invites an expression of opinion upon the same. The advice tendered by parliament may be unfavourable to the policy of ministers, and its indispensable assistance withheld. Thus, the American war was brought to a close, against the will of the king, by the interposition of the House of Commons.<sup>4</sup>

Interference of parliament with this prerogative.

In 1791, Mr. Pitt was obliged to abandon an intended war

<sup>1</sup> Macaulay, in *Hans. D.* v. 84, p. 889; Palmerston, *Ib.* v. 144, p. 168, and 146, p. 1638; Lord Grey, *Ib.* v. 144, pp. 72, 2475; Disraeli, *Ib.* v. 218, p. 89. For precedents of parliamentary interference in questions of war and peace, see May, *Const. Hist.* v. 1, p. 458; Smith's *Parl. Rememb.* 1859, p. 95; 1860, p. 1.

<sup>2</sup> *Com. Jour.* Feb. 11, 1793; May 22, 1815; March 27, 1854. No message was sent upon the commencement of the China War; see *Mir. of Parl.* 1840, p. 2584. As regards the Persian War, see *Parl. D.* v. 146, p. 1577. And as to wars in India, *Ib.* 151, p. 1002, etc. A debate arose in the House of Commons in 1867 (*Hans. D.* v. 190, p. 178), upon the question whether the conduct of the government in prosecuting the expedition for the forcible release of certain British subjects imprisoned in Abyssinia, without immediate appeal to Parliament, was constitutional. The 54th Clause of the Indian Government Act, 21 & 22 Vict. § 106, expressly directs that—when any order to commence hostilities is sent to India the fact shall be communicated to parliament within three months, if parliament be sitting, or within one month after its next meeting. The China war (1857–1860) was “begun and finished without the servants of the crown thinking fit to ask for a direct approval of their policy by parliament,” although resolutions condemnatory of the war were proposed in both houses and carried in the House of Commons (*Hans. D.* v. 161, p. 546).

<sup>3</sup> *Com. Jour.* Dec. 8, 1795, Oct. 29, 1801, Jan. 31, 1856.

<sup>4</sup> On March 4, 1782, the House resolved, that “all those who should advise the continuance of the American war were to be considered as enemies to the king and country.” This brought the war to an end, despite the wishes and intentions of George III. (May, *Const. Hist.* v. 1, p. 458).



with Russia, which he deemed essential to the preservation of the balance of power in Europe, in deference to the adverse opinion of the House of Commons, expressed indirectly but unmistakably, after a royal message on the subject had been transmitted to parliament;<sup>1</sup> and in 1857, the House of Commons condemned the policy of the war with China. This occasioned a dissolution of parliament, which resulted in favour of ministers.

But if the government, on their own responsibility, and with a knowledge of the international relations of the kingdom, which it would have been impolitic to have fully disclosed to parliament beforehand, should have found it necessary, in defence of the honour or the interests of the state, to engage in a foreign war, it becomes the duty of parliament, in the first instance, to afford the crown an adequate support. Thus, Mr. Disraeli, the leader of the opposition, upon the declaration of war with Russia, in 1854, said, "If her Majesty sends a message to parliament, and informs us that she has found it necessary to engage in war, I hold that it is not an occasion when we are to enter into the policy or impolicy of the advice by which her Majesty has been guided. It is our duty, under such circumstances, to rally round the throne, and to take subsequent and constitutional occasions to question the policy of her Majesty's ministers, if it be not a proper one."<sup>2</sup>

Parliament is bound to sustain the crown in a foreign war.

2. The sovereign is the constitutional representative of the nation in its intercourse with foreign powers. The transaction of affairs of state with other nations appertaining exclusively to the executive government, which is always in existence, ready for the discharge of its functions, and constantly assisted by experienced advisers in the performance of its discretionary powers.

Intercourse between the crown and foreign powers.

The medium of communication between the sovereign of Great Britain and the accredited representatives of foreign nations is the secretary of state for foreign affairs. It is his duty, in official interviews with foreign ministers, and by means of written de-

Secretary of state is the medium of communication.

<sup>1</sup> Stanhope's *Pitt*, v. 2, p. 113.

<sup>2</sup> *Hans. D.* v. 132, p. 281. For similar remarks by Mr. Disraeli in reference to this prerogative, see *ib.* v. 173, p. 97.

spatches, to convey the views, opinions, and conclusions of the government upon matters arising out of the relations of the British crown with other countries.

It is a necessary rule that the substance of all personal communications between the representatives of the British crown and the ministers of any foreign country, upon matters of public concern, should be committed to writing, in order that a fair and complete record of the transactions between Great Britain and other states may be preserved in the Foreign Office, and, in due course, submitted to parliament.<sup>1</sup> The English

Information thereof to be given to parliament. constitutional system requires that parliament should be informed, from time to time, of everything which is necessary to explain the conduct and policy of government, whether at home or abroad,<sup>2</sup> in order that it may interpose with advice, assistance, or remonstrance, as the interests of the nation may appear to demand. It is unquestionably of immense advantage to the

Advantage of communicating to parliament information on foreign policy.

country, that the diplomatic transactions and proceedings of government abroad should be freely communicated to parliament, for thereby the foreign policy of the crown ordinarily receives the approbation of parliament, and is sustained by the strength of an enlightened public opinion.<sup>3</sup> This in itself confers an additional weight to our policy and opinions abroad. On the other hand, it is notorious that the English system of giving publicity to information obtained by government, in regard to occurrences in foreign countries, is viewed with disfavour on the Continent. A knowledge of the fact that all information procured by our foreign agents is liable to be made public, induces towards them a feeling of reserve on the part of the representatives of other governments; and necessitates that our ministers should resort, more than they would otherwise do, to the practice of private correspondence.<sup>4</sup>

A certain amount of discretion must always be allowed to

<sup>1</sup> See Mr. Disraeli's speech in *Hans. D.* v. 157, p. 1179.

<sup>2</sup> *Ld. Palmerston, Ib.* v. 173, p. 1103; *Lord Russell, Ib.* v. 203, p. 1060.

<sup>3</sup> See Lord Clarendon, on the increasing power of public opinion over the foreign policy of the government, *Hans. D.* v. 183, p. 572; and see Amos, *Fifty Years of Eng. Const.* p. 370.

<sup>4</sup> *Rep. of Com. Com<sup>o</sup>. on the Diplomatic Service, Com. Pap.* 1861, v. 6, pp. 75, 130, 344, 392.

the government in respect to communicating or withholding documents and official correspondence which may be asked for by either House of Parliament. While it is necessary that parliament should be informed of all matters which are essential to explain or defend the policy of the government, it is equally necessary that a minister should be able, upon his own responsibility, to withhold from the public such information as he may judge could not be afforded without detriment to the public service. Ministers are sometimes obliged to give "extracts" only from official papers, in certain cases; but parliament is bound to receive what is communicated upon the faith and credit of the administration in whom their general confidence is reposed, unless they are prepared to question the personal integrity of ministers, or to pronounce a verdict of censure upon their public conduct.<sup>1</sup>

Discretion in withholding what ought not to be divulged.

"Extracts" given in certain cases.

Thus, it is generally inexpedient, and highly impolitic, to communicate to parliament papers concerning diplomatic negotiations which are still pending; sometimes, indeed, the government, in the exercise of their own discretion, have laid before parliament papers in such circumstances expressly in order that the opinion of parliament might be declared, so as to influence the course of events.<sup>2</sup> But in 1860 a motion in the House of Commons, for the production of a copy of a despatch received from abroad (upon a subject on which negotiations were pending), and before it had been answered, was successfully opposed by the foreign secretary (Lord John Russell), on the ground that "such a course would not only be contrary to precedent, but contrary to every principle recognized by the Constitu-

Papers concerning pending negotiations.

<sup>1</sup> A debate took place in the House of Commons on March 19, 1861, on a motion for a committee to consider the discrepancies between the copies of certain correspondence relating to Afghanistan, which was presented to parliament in 1839, and again (in a different shape) in 1858; and to report thereon with a view to secure that all copies of documents presented to the House shall give a true representation of the originals. After explanations on the part of Lord Palmerston, against whose official conduct the motion was directed, it was negatived. But see Smith's *Parl. Rememb.* 1861, p. 45; and Louis Blanc's *Letters on England*, 2nd ser. v. 1, p. 206. See also the case of the China Despatches, noticed in Smith's *Parl. Rememb.* 1860, p. 35.

<sup>2</sup> Mr. Disraeli, citing case of Crimean War, in 1854, *Hans. D.* v. 173, p. 863.

tion:" it "would be like inviting the House to dictate the answer."<sup>1</sup>

It is a common practice, in order to save time, to send on a despatch, intended for presentation to a foreign court, by the British minister abroad, with instructions to withhold the delivery thereof until all the parties concerned had agreed upon it. If afterwards the despatch is not agreed to, it is simply cancelled. It then has no existence; and government have uniformly refused to communicate to parliament the original draft of any such despatch.<sup>2</sup> It is likewise contrary to diplomatic usage to communicate to parliament, or to the public, the answer to a despatch, until it has been received by the power to which it has been addressed.<sup>3</sup>

In communications between the imperial government and its agents abroad, private and confidential letters are necessarily frequently made use of. These letters refer to circumstances not sufficiently certain, or sufficiently important, to be placed in the formal shape of a despatch; or it may be that they communicate circumstances which have been learnt from conversations, or otherwise express opinions which it would be impossible to lay before parliament without placing the writer in a position that would exclude him thereafter from all means of information which it is essential he should obtain. Such letters it is the duty of the foreign secretary to receive, and it is equally his duty not to lay them before the House.<sup>4</sup>

It is contrary to the etiquette observed towards sovereign princes to communicate to parliament autograph letters addressed by them to the monarch of Great Britain. The practice is, for the secretary of state to refer to the substance of such letters in an official despatch, acknowledging the receipt thereof, whereby

<sup>1</sup> *Hans. D.* v. 157, p. 1177.

<sup>2</sup> *Ld. Palmerston, Ib.* v. 173, p. 540; *Layard, Ib.* v. 175, p. 662.

<sup>3</sup> *Ib.* v. 234, p. 319.

<sup>4</sup> *Ld. Palmerston, Ib.* v. 157, p. 1182; and see Walrond's *Letters of Ld. Elgin*, p. 79. For discussions concerning the publication of "private and confidential letters," addressed by Sir D. Lange to the foreign secretary, see *Hans. D.* v. 227, pp. 1426-1436, 1500. As to the use of private correspondence in communications between the Home and East Indian governments, and especially with the Indian Frontier States, see *Ib.* v. 234, p. 1829.

an official record is preserved of their contents.<sup>1</sup> Nor is it proper, or consistent with practice, to lay before parliament a letter from a foreign monarch to one of his ministers of state, even though a copy of the same may have been transmitted to the Foreign Office by our own ambassador.<sup>2</sup>

It is also unusual to lay before parliament any communications between ambassadors and ministers abroad and the sovereign to whom they are accredited. Such documents are regarded as "confidential" for the obvious reason that their production "might lead to serious consequences."<sup>3</sup>

The sovereign, considered as the representative of her people, has the exclusive right of sending ambassadors to foreign states, and receiving ambassadors at home.<sup>4</sup> This prerogative should be regarded as inviolate, and should not be interfered with by either House of Parliament,—except in cases of manifest corruption or abuse; else the responsibility for its faithful exercise by the minister of state, who is properly accountable for the same, would be impaired, if not destroyed.<sup>5</sup>

It would be a manifest breach of this prerogative and of international courtesy for either House of Parliament to communicate directly with any foreign

Appointment  
of ambassa-  
dors.

Houses of Par-  
liament may

<sup>1</sup> Mr. Canning, in *Parl. D.* v. 36, p. 187.

<sup>2</sup> *Hans. D.* v. 184, p. 381.

<sup>3</sup> *Ld. John Russell, Ib.* v. 131, p. 702.

<sup>4</sup> Bowyer, *Const. Law*, pp. 157, 158.

<sup>5</sup> Upon the accession to office of Sir Robert Peel, in 1835, he selected Lord Londonderry to be ambassador at St. Petersburg. This choice was unpopular in the House of Commons; and, on March 13, 1835, a motion was made for an address "for a copy of the appointment, if any, of an ambassador to St. Petersburg, together with a return of the salary and emoluments attached thereto." No vote was taken on this motion, it being stated that the appointment, although intended, had not yet been made. But the adverse feeling towards Lord Londonderry on the part of the House of Commons was so apparent, that his lordship, without communicating with any member of the government, declared in the House of Lords that he would not accept the mission (*Mir. of Parl.* 1835, p. 350). Both the Duke of Wellington and Lord John Russell protested against the unconstitutional invasion by the House of Commons of the royal prerogative (*Ib.* pp. 350, 358); and Sir R. Peel, who had announced his intention of adhering to the choice he had made (*Ib.* p. 335), afterwards stated that he had been no party to Lord Londonderry's withdrawal, and that, had the address passed, he should have resigned office (*Ib.* 1841, p. 1834; Peel's *Mem.* v. 2, p. 88).

not communicate directly with foreign powers.

prince or power. All such communications should be made officially through the government, and by a responsible minister of the British crown.<sup>1</sup>

Houses of Parliament can only communicate with other legislative bodies through the imperial executive.

This principle forbids of any formal communications between the Houses of Lords and Commons and other legislators in the British empire, except through the medium of the executive officers of the imperial government; and likewise of any official communication between a colonial and a foreign government, except through the same channel.

Rights of the sovereign in making treaties.

3. It is a peculiar function of sovereignty to make treaties, leagues, and alliances with foreign states or princes; and by the law of nations it is essential to the validity of a treaty that it be made by the sovereign power, for then it binds the whole community. In

the British empire this sovereign power is vested exclusively in the crown, acting under the advice of its responsible ministers.

Whatever engagements or contracts the sovereign enters into, no other power within the kingdom can legally delay, resist, or annul; although the king's ministers are responsible to parliament for their participation in the conclusion of any treaty derogatory to the honour and interests of the nation.<sup>2</sup>

A treaty is a promise or engagement entered into by the

<sup>1</sup> Two members, Messrs. Roebuck and Lindsay, in the course of debate upon the expediency of recognizing the Southern American Confederacy, communicated to the House an opinion of the Emperor of the French upon the subject, which his Imperial Majesty, they stated, had authorized them to make known to the House of Commons. This proceeding elicited from Lord Palmerston (the premier) some very pertinent remarks. "The British parliament," he said, "is in no relation to, has no intercourse with, no official knowledge of, any sovereign of any foreign country. Therefore it is no part of our functions to receive communications from the sovereign or government of any foreign state, unless such communications are made by the responsible minister of the crown, in consequence of official communications held by order of a foreign government with the British government." After further observations on this point, his lordship declared that he thought it right to place on record, so far as could be done by a statement in the House, that the proceeding in question was "utterly irregular, and ought never to be drawn into precedent" (*Hans. D. v. 172*, p. 669).

<sup>2</sup> Bowyer, *Const. Law*, p. 160; 1 Blackstone, c. vii.; Ld. Palmerston, *Hans. D. v. 174*, p. 787; Ld. Stanley, *Ib. v. 187*, p. 1916. See debate in House of Lords on the interpretation of the "collective guarantee" in the treaty of Luxemburg, *Hans. D. v. 188*, p. 966.



highest authorities in the states concerned to do certain things. But it is an obligation of honour and good faith. No penalty is provided for its violation; and there is no existing tribunal or external authority, which can enforce the obligations of a treaty.<sup>1</sup>

The constitutional power appertaining to parliament in respect to treaties is limited. Their formal sanction or ratification by parliament, as a condition of their validity, is not required.<sup>2</sup> The proper jurisdiction of parliament in such matters may be thus defined:

Power of parliament in respect to treaties.

First, it has the right to give or withhold its sanction to those parts of a treaty that require a legislative enactment to give it force and effect; as, for example, when it provides for an alteration in the criminal or municipal law, or for the extradition of criminals, or proposes to change existing tariffs or commercial regulations.<sup>3</sup> Second, either House has the right to express to the crown, by means of an address, its opinion in regard to any treaty, or part of a treaty, that has been laid before parliament.<sup>4</sup> Third, it is in the power of either House, if it disapproves of a convention or treaty, to visit the ministers of the crown who are responsible for the same with censure or impeachment, as the case may be.<sup>5</sup>

If a treaty requires legislative action, in order to carry it out, it should be subjected to the fullest discussion in parliament.

<sup>1</sup> Lord Derby, *Hans. D.* v. 230, p. 1462; Ld. Hammond, *Ib.* p. 1803; H. Richard, M.P., on the *Obligation of Treaties in Law Mag.* 4th ser. v. 3, p. 91; and a paper on Treaties of Guarantee, *Ib.* v. 6, p. 215.

<sup>2</sup> *Hans. D.* v. 156, p. 1361; *Ib.* v. 201, p. 174; Lord Derby's evidence before Com<sup>o</sup>. on Diplom. Service, *Com. Pap.* 1870, v. 7, p. 468.

<sup>3</sup> See cases in Hertslet's *Treaties*, v. 9, p. 1064, etc.; and see Forsyth, *Const. Law*, p. 369.

<sup>4</sup> Mr. Pitt's dictum, Smith's *Parl. Rememb.* 1860, p. 33. Ld. Aberdeen's motion in House of Lords, Jan. 26, 1832, for an address to the king, to cause certain alterations to be made in the project of a treaty respecting Holland, which had been made public, with a view to the honour of Great Britain and the just claims of Holland (*Mir. of Parl.* 1831-2, pp. 310, 2823). Mr. B. Cochrane's motion, in House of Commons, on July 13, 1860, in regard to an article in the treaty with China, respecting the residence of a British plenipotentiary at Peking; and Ld. John Russell's observations thereupon (*Hans. D.* v. 159, p. 1886).

<sup>5</sup> Mr. Gladstone, in *Hans. D.* v. 156, p. 1380; Ld. H. Petty's motion of censure in regard to the Convention of Cintra, *Parl. D.* Feb. 21, 1809. For older cases, see Cox, *Inst. Eng. Govt.* p. 599; and *ante*, p. 54.

ment, and especially in the House of Commons, with a view to enable the government to promote effectually the important interests at stake, in their proposed alterations in the foreign policy of the nation.<sup>1</sup> But, while parliament may refuse to agree to measures submitted to them for the purpose of giving effect to any treaty, they have no power to change or modify, in any way, a treaty itself.<sup>2</sup>

Until of late years, it was not usual to lay before parliament treaties prior to their ratification by the governments concerned. A contrary practice has recently prevailed in several instances.<sup>3</sup> Nevertheless, the prerogative of the crown in this particular has not been abandoned, and it is still in the discretion of government to refrain from communicating any treaty, especially a treaty of peace, to either House of Parliament until after it has been ratified.<sup>4</sup>

Right of  
government to  
withhold  
information.

Treaties between foreign powers, to which Great Britain is not a party, are not communicated to parliament; although copies thereof may be in the possession of the British government.<sup>5</sup>

It is unnecessary and inexpedient for the House of Commons to interfere in any way, or declare its opinion, on any matter of alleged violation of treaty, or which concerns the foreign relations of Great Britain with other countries; unless at the instigation of the executive government, and with a view to powers or

Alleged  
violations of  
treaties.

<sup>1</sup> *Hans. D.* v. 156, pp. 1256, 1326.

<sup>2</sup> Mr. Gladstone, *Ib.* v. 71, p. 548.

<sup>3</sup> *Ib.* v. 206, p. 1103. In 1865, the government submitted to the House of Commons a "Sugar Duties and Drawback Bill," the object of which was, "to give effect to a treaty which had not yet been ratified, and therefore could not be presented to the House in the usual form, by command of her Majesty; but for the information of the House, as the treaty required legislation, a copy had been presented as a return from the Treasury (*Ib.* v. 206, p. 1103). In 1870, a treaty of neutrality with Belgium was for special reasons informally communicated to both Houses of Parliament on the day of prorogation, although its formal ratification had not been completed (*Ib.* v. 203, pp. 1759, 1790). The same course was taken with regard to the treaty of Washington in 1871 (*Ib.* v. 206, p. 1108), and in the case of the French Commercial Treaty in 1873 (*Ib.* v. 214, p. 173).

<sup>4</sup> Mr. Gladstone, *Ib.* v. 214, p. 470.

<sup>5</sup> *Mir. of Parl.* 1834, p. 2858.

opinions sought for by the executive ; as matters affecting our relations with foreign countries are prerogative.<sup>1</sup> But questions may be put to the administration in parliament, in reference to alleged infractions of treaties by foreign powers, and for the purpose of directing the attention of government thereto.<sup>2</sup>

Moreover, "it is neither regular to ask, nor is it convenient to answer, questions relative to treaties which are yet pending."<sup>3</sup> The initiation of a foreign policy and the conduct of negotiations with foreign powers appertain exclusively to the executive government, who are responsible for the course and issue of the same ; and should not be interfered with by parliament, who necessarily can only possess imperfect information upon the subject, either by advice or by vote.<sup>4</sup> So long as parliament is satisfied with the general principles upon which negotiations are being conducted, and approves of the general policy of the government, it should abstain from all interference with pending negotiations.<sup>5</sup>

After the conclusion of important negotiations with the representatives of any foreign state or states, it is usual for

<sup>1</sup> Lord John Russell, *Hans. D.* v. 90, pp. 890, 891. See the discussion, in the House of Commons, on June 28, 1861, on an abstract resolution proposed in reference to the Garibaldi fund, for the liberation of Italy. And on the motion in the House, on April 28, 1864, to resolve that certain instructions issued to a colonial governor, in regard to the observance of neutrality in the American Civil War, were "at variance with the principles of international law."

<sup>2</sup> See *ib.* v. 157, pp. 749, 757 ; v. 158, pp. 1109, 1120.

<sup>3</sup> *Mir. of Parl.* 1841, p. 1032.

<sup>4</sup> British guarantee in the Luxemburg case, *Hans. D.* v. 187, p. 259 ; Treaty of Tien-tsin, *ib.* v. 191, p. 1147. Mr. Bagehot, in his *Eng. Const.* ed. 1872, urges the expediency of some parliamentary control over the making of treaties, as by requiring that they be laid upon the table of both Houses certain days before they become valid (pp. xlv.-xlix.). But see Mr. Gladstone thereon, *Hans. D.* v. 210, p. 325.

<sup>5</sup> See the speeches of Mr. Disraeli and of Ld. Palmerston, in *Hans. D.* v. 175, pp. 1279, 1286 ; and of Lords Derby and Russell, *ib.* pp. 1924, 1928. Papers regarding pending negotiations with foreign powers are only communicated to parliament at the discretion of the crown, and so far as they can be produced without public injury or inconvenience (see *Mir. of Parl.* 1830, p. 671 ; 1840, pp. 2047, 2049 ; 1841, p. 1507 ; *Hans. D.* v. 187, p. 1492). Confidential communications from foreign powers are never laid before parliament without previous communication with the powers concerned (Disraeli, *ib.* v. 230, p. 885).

the government to communicate the result to parliament, and to declare what is the course which the government propose to take in regard to the questions involved therein.<sup>1</sup> If either House should be of opinion that the government has failed in its duty in any respect, it is competent for them to take any line of conduct they may think proper, in order to make known to the crown their opinions upon the subject.<sup>2</sup> For, while the initiation of a foreign policy is the prerogative of the crown, to be exercised under the responsibility of constitutional ministers, it is the duty of parliament, when the result of the negotiations conducted by ministers has been communicated to them, to criticize, support, or condemn that policy, as they may deem the interests of the nation shall require.<sup>3</sup>

The question whether the crown has power by its prerogative to cede British territory to a foreign state, except under a treaty of peace, or to dispossess itself of its sovereignty over any portion of its dominions, without the assent of parliament, has been frequently discussed, and still remains doubtful.<sup>4</sup> This question, so far as regards the right of the crown to surrender to a foreign state a part of its territory, was supposed to have been settled in the affirmative, on the authority of Lord Chancellor Thurlow, but Lord Campbell disputed the correctness of the dictum of his predecessor.<sup>5</sup> The point again arose in 1863 upon the cession of the Ionian Islands to Greece, when it was argued by Lord Grey, in favour of the crown ;<sup>6</sup> also by Lord Palmerston, and Sir R. Palmer (Solicitor-General), to a similar effect, with an exception in the

Result of negotiations to be made known to parliament.

Whether the crown may dispossess itself of territory, without assent of parliament.

<sup>1</sup> Mr. Gladstone, *Hans. D.* v. 199, p. 325.

<sup>2</sup> Lord Russell, *ib.* v. 176, p. 323.

<sup>3</sup> Mr. Disraeli, *ib.* p. 749.

<sup>4</sup> See a digest of cases and opinions on the subject in Forsyth, *Const. Law*, pp. 182-186 ; and the debate in House of Commons, in 1854, in relation to the issue of a royal proclamation abandoning the sovereignty of the crown over the Orange River territory, *Hans. D.* v. 133, pp. 53-87. And see Amos, *Fifty Years Eng. Const.* p. 413 ; also observations in both Houses in regard to the proposed transfer of the Gambia Settlement to France, *Hans. D.* v. 201, p. 1843 ; v. 203, pp. 339, 351 ; v. 206, p. 153 ; v. 226, p. 444 ; v. 227, p. 374 ; v. 228, p. 264.

<sup>5</sup> Campbell's *Chanc.* v. 5, pp. 555, 556, *n.* ; Smith's *Parl. Rememb.* 1863, pp. 13, 141.

<sup>6</sup> *Hans. D.* v. 169, p. 57.

case of newly-discovered territories which had been settled by British subjects, when the laws of England having been introduced therein, it was contended that the cession could not take place without the consent of parliament. Or, in the case of conquered or ceded countries, if parliament had legislated concerning them, Sir Roundell Palmer considered that the concurrence of parliament might be necessary to their relinquishment: <sup>1</sup> an opinion which was considered by the Privy Council, without being fully decided, in 1876.<sup>2</sup>

The consent of parliament is not necessary to the acquisition, by the crown, of additional territory, from foreign powers; provided the same is not obtained by purchase.<sup>3</sup>

Consent of parliament not necessary for acquisition of territory.

4. The crown, acting through the secretary of state for foreign affairs, is sometimes called upon to express its opinions in regard to the conduct of other powers, in matters of internal or domestic concern.

Interference in concerns of foreign nations.

The interests of British subjects resident in foreign parts, or engaged in commercial transactions with foreign citizens, may require the interposition of the crown on their behalf; or a particular line of policy adopted by a foreign state towards its own subjects, or towards a neighbouring state, may be viewed by the British government as contrary to recognized principles of humanity, or of natural right, or as being likely to occasion a disturbance of the peace of nations. In such circumstances, the crown is warranted by international usage in offering friendly advice or remonstrance to a foreign government.<sup>4</sup> But great delicacy is necessary in all such acts of intervention, lest they should fail of their intended effect, and irritate instead of conciliating;<sup>5</sup> thereby

Intervention in foreign affairs.

<sup>1</sup> *Hans. D.* v. 169, pp. 230, 1807; and see *Ib.* v. 174, p. 378.

<sup>2</sup> *Damodhar Gordhan v. Deoram Kangi*; 1 *L. R. App. Cases*, p. 332; and *Law Rev.* v. 4, 4th ser. p. 277.

<sup>3</sup> *Dutch Guinea*, *Hans. D.* v. 205, p. 657; v. 211, p. 287; *Diamond Fields in S. Africa*, *Ib.* v. 207, p. 1631; acquisition of Fiji, *Ib.* v. 226, p. 571; and see Amos, *Fifty Years of Eng. Const.* p. 403.

<sup>4</sup> See a number of instances, cited by *Ld. Palmerston*, wherein the British government "have interfered with great success in the affairs of other countries, and with great benefit to the countries concerned" (*Hans. D.* v. 175, p. 532; *Ib.* v. 235, p. 402).

<sup>5</sup> *Ld. Palmerston*, when foreign secretary, gave frequent offence to foreign governments, and even to his own government. Thus, in 1848, an irritating and ill-judged despatch, which greatly irritated the Spanish



weakening the moral strength of the crown in its foreign relations, or necessitating a resort to arms.

It is obvious that, if any diplomatic interventions are called for, they can only be exercised through the recognized official channels of international communication. Direct interference by either House of Parliament in the domestic or municipal concerns of a foreign country would be highly irregular and unconstitutional.<sup>1</sup> If, however, by virtue of existing treaties with a foreign state, or for any other reason, the British crown possesses a distinct and formal ground for interposition in a domestic matter arising within a foreign territory, it would be perfectly regular for either House to address the crown to exercise that right; or for either House themselves to appoint a committee to institute inquiries into matters within the jurisdiction of foreign countries, but in relation to which British subjects have a direct interest.<sup>2</sup>

Such proceedings, however, must be restrained within the limits of political expediency, and should not be persevered in, if opposed, on this ground, by the responsible advisers of the crown.<sup>3</sup> But there is a manifest difference between an un-

government, and gave rise to much debate in both Houses of Parliament (Martin's *Pr. Consort*, v. 2, p. 65; and see *ib.* pp. 278, 301).

<sup>1</sup> See *Ld. Stanley's* remarks on a proposal to record the opinion of the House of Com. on the murder of Maximilian, Emperor of Mexico, and his generals, *Hans. D.* v. 188, pp. 1393, 1709.

<sup>2</sup> Thus in 1875, the House of Commons appointed a select committee to inquire into the circumstances attending the making of contracts for loans by British subjects with certain foreign states, and into the causes which have led to the non-payment of the principal and interest of such loans. This committee reported on July 29 (*Com. Pap.* 1875, v. 11, p. 1).

<sup>3</sup> *Ld. Palmerston*, on proposed address for the recognition of the Southern American Confederacy, *Hans. D.* v. 172, pp. 556, 668. In the years 1794 and 1796 (see *Parl. D.* on General Fitzpatrick's motions on March 17, 1794, and Dec. 16, 1796), the House of Commons was moved to address the crown to intercede with the government of Prussia for the liberation of General Lafayette and other Frenchmen, who had been captured during the war with France, and confined in Prussian prisons. Mr. Pitt, however, successfully resisted the motions on constitutional grounds. He said, "No instance of such interference as is now proposed has ever occurred at any former period, . . . nor could such interference be attempted without establishing a principle of the most unwarrantable tendency; a principle inconsistent with the internal policy and independent rights of foreign states." "It would be improper for this House to take any share in a transaction which in no degree comes within their province,



authorized interference in the municipal proceedings of a foreign country and interference with a specific object, under a specific treaty.<sup>1</sup>

and on which their decision could have no influence" (*Parl. Hist.* v. 32, p. 1362).

On a similar occasion, in 1836, a motion was made in the House of Commons for an address to his Majesty to use his good offices with his ally, the King of the French, for the release of Prince Polignac and other state prisoners, formerly ministers of state of the late King Charles X., now confined in the fortress of Ham for attempting a revolution in France, which was afterwards successfully accomplished by others in July, 1830, and by means of which the present King of the French was placed upon the throne. The foreign secretary (Lord Palmerston), though personally sympathizing in the object sought to be obtained by the motion, declared that the House "could take no step so inexpedient, or even dangerous, as to ask the King of England by address to interfere in matters connected with the domestic concerns of another country" (*Mir. of Parl.* 1836, p. 1611. And see *Life of T. S. Duncombe, M.P.* v. I, pp. 237-244).

In 1839, a member moved an address for correspondence between the Foreign Office and the British minister at Stockholm relative to the erection of Slito, in Gottland, into a free-port, to the manifest advantage of British interests. Lord Palmerston opposed the motion, because neither "this House nor the English government has any business to meddle with the internal affairs of the government of Sweden," as would be done were this motion to prevail. It was accordingly negatived (*Mir. of Parl.* 1839, pp. 786-792; see also *Ib.* p. 2762). And in 1861, a motion for copies of despatches from our ambassador at Vienna, describing the constitution lately granted by the Emperor of Austria to his subjects, was withdrawn; on its being stated by the foreign secretary (Lord John Russell) that, "although there is no secret about the matter," it was not desirable to produce papers "which relate so entirely to the internal affairs of Austria" (*Hans. D.* v. 162, p. 1870).

<sup>1</sup> Lord Derby, *Ib.* v. 234, p. 1823. Recognizing this distinction, the government acquiesced in motions made in the House of Commons, both in 1832 and 1842, for addresses for copies of manifestoes and ukases issued by the Russian government, and relating to the administration of the kingdom of Poland; England having been party to a treaty, in 1815, by which the condition of Poland had been regulated, and subsequent acts of the Russian government towards the Poles having taken place, in alleged contravention of that treaty (Sir R. Peel, in *Hans. D.* v. 64, pp. 823-825); and in 1841, a member moved to resolve that, in the opinion of the House of Commons, certain tolls, known as the Sound dues, levied by the King of Denmark on British (and other) shipping were unjust, and required revision. The foreign secretary admitted the fact, and that the grievance was one of long standing; but he declared that negotiations had been recommenced for the removal of the tolls, and that it was therefore inexpedient for the House to interfere. Sir R. Peel (in Opposition at the time) concurred in the inexpediency of interference by the House in foreign negotiations, but considered that, if the crown should be unable to procure redress, the House might properly and advantageously interpose, and

The British government has likewise a right to interfere and demand redress from a foreign government whenever there is reason to believe that any British subject has suffered a wrong for which that government is responsible, and has failed to obtain redress. Papers, in such cases, should be submitted to parliament; and, if it should appear that there is any ground of complaint against the Foreign Office, that department would be amenable to parliamentary criticism and censure.<sup>1</sup> But the government have distinctly declined to take up, as international questions, complaints of British subjects against foreign states arising out of private loan transactions; or to interpose, except by good offices, between bondholders and the states by which they may be wronged.<sup>2</sup>

Protection of  
British  
subjects.

Bearing in mind the constitutional limits wherein the active interference of parliament in the affairs of foreign nations is necessarily restrained, there is, nevertheless, an important function fulfilled by the British legislature, as the mouthpiece of an enlightened public opinion, which calls for special remark. When events are transpiring abroad upon which, in the interests of humanity, or of the peace and good government of the world, it is desirable that British statesmen should have an opportunity of declaring their sentiments, from their place in parliament—whether by so doing they merely express, with the weight due to their personal character and high official position, the general feelings of the country, or whether they aim at influencing public opinion itself by intelligent and authoritative explanations upon points concerning which

Opinions ex-  
pressed in  
parliament on  
foreign affairs.

Foreign affairs.

fortify the crown by a temperate expression of opinion on the subject, which would doubtless have weight with the Danish government. By general consent, the motion was set aside by the previous question, to be renewed at another time, if necessary (*Mir. of Parl.* 1841, pp. 790-793). The House was afterwards informed, in reply to a question, of the satisfactory progress of the negotiations (*Ib.* p. 2364).

<sup>1</sup> Affairs of Greece, *Hans. D.* v. 111, p. 1293; *Ib.* v. 112, pp. 228, 329, 478, 639-739; case of the *Tornado*, *Ib.* v. 200, p. 2109; murder of British subjects by Greek brigands, *Ib.* v. 201, pp. 1123, 1162; v. 203, pp. 5, 1412.

<sup>2</sup> Foreign Sec. despatch of Ap. 26, 1871, quoted in *Hans. D.* v. 225, p. 201; and see observations in House of Com. on July 21 and Aug. 14, 1876, on the guaranteed Turkish Loan of 1854; and see *Hans. D.* v. 235, p. 1322.

they possess peculiar facilities for instructing the public mind—it is customary for some member to call the attention of the House and of the government thereto, in an informal way, or upon a motion for papers;<sup>1</sup> or, if need be, to propose resolutions, to express the sense of the House in regard to the proper action of the British crown in such a contingency. But, while important beneficial results may follow from the temperate use of this practice, it is liable to great abuse. Discussions upon topics which are beyond the jurisdiction of parliament to determine should not be provoked except upon grave and fitting occasions. When, by the operation of existing treaties, the position or interests of England may be affected by events transpiring in other countries<sup>2</sup>—or where there is a reasonable probability that the observations of statesmen and politicians in the British legislature will have a beneficial influence upon the fortunes of the country to which they refer<sup>3</sup>—they would not be unsuitable or out of place. But, whenever the ministers of the crown discourage or deprecate the expression of opinions in parliament upon the course of affairs in other countries, it is safer to defer to their guidance, and to refrain from utterances that may be hurtful to the cause which it is desired to promote, and that might even operate prejudicially upon the interests of the British nation.<sup>4</sup>

We have now passed under review some of the prerogatives of the British crown, and have endeavoured to point out, in the light of precedent, and with the help of recognized authority in the interpretation of constitutional questions, the proper functions of parliament in relation thereto. We have shown that the exercise of these prerogatives

Concluding remarks.

<sup>1</sup> See the observations of Sir R. Peel and Ld. J. Russell on religious intolerance in Spain, *Hans. D.* v. 161, pp. 2054, 2072; discussion on the affairs of Denmark and Holstein, in the Lords, on March 18, 1861; and on the Pope and the Kingdom of Italy, in the Lords, on April 19, 1861; debates on the affairs of Poland in the Lords on July 19, 1861, and in the Commons on Feb. 27, 1863. And the debates in the Commons on the state of Turkey on June 18, 1875; and, in 1877, upon the Eastern Question, especially on the resolutions proposed by Mr. Gladstone, *Hans. D.* v. 234, pp. 101, 955.

<sup>2</sup> *Hans. D.* v. 169, p. 884; and see the debate in the Commons (upon a formal motion), *Hans. D.* v. 190, p. 1983, on the law of expatriation.

<sup>3</sup> Sir F. Goldsmid and Ld. Palmerston, *ib.* v. 167, pp. 1171, 1195.

<sup>4</sup> *Hans. D.* v. 195, p. 362.

has been entrusted, by the usages of the Constitution, to the responsible ministers of the crown, to be wielded in the king's name and behalf, for the interests of the state ; subject always to the royal approval, and to the general sanction and control of parliament. Parliament itself, we have seen, is one of the councils of the crown, but a council of deliberation and advice, not a council of administration. Into the details of administration a parliamentary assembly is, essentially, unfit to enter ; and any attempt to discharge such functions, under the specious pretext of reforming abuses, or of rectifying corrupt influences, would only lead to greater evils, and must inevitably result in the sway of a tyrannical and irresponsible democracy. "Instead of the function of governing, for which," says Mill,<sup>1</sup> "such an assembly is radically unfit, its proper office is to watch and control the government ; to throw the light of publicity on its acts ; to compel a full exposition and justification of all of them which any one considers questionable ; to censure them if found to merit condemnation ; and if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office"—or, rather, compel them to retire, by an unmistakable expression of the will of parliament. Instead of attempting to decide upon matters of administration by its own vote, the proper duty of a representative assembly is "to take care that the persons who have to decide them are the proper persons," "to see that these individuals are honestly and intelligently chosen, and to interfere no further with them ; except by unlimited latitude of suggestion and criticism, and by applying or withholding the final seal of national assent."<sup>2</sup>

<sup>1</sup> Mill, *Rep. Govt.* p. 104.

<sup>2</sup> *Ib.* pp. 94, 106. The whole chapter "On the Proper Functions of Representative Bodies" is deserving of a careful study.

## CHAPTER III.

THE PREROGATIVE OF THE CROWN AND THE PRIVILEGE OF  
PARLIAMENT—*continued.**The Crown as the Head of the Church and State.*

IN dealing with the remaining prerogatives of the crown, which will be considered in the present and in the succeeding chapters, it will be convenient to arrange them under distinct headings. The first of these will deal with the crown as the head of the State and of the Church. The second of them will describe some other attributes belonging to the king. It will deal with the crown as the fountain of justice, the fountain of mercy, the fountain of honour.

1. The crown is the legal head of the Church established in the realm of England; the interpreter of the meaning intended to be conveyed by the Thirty-nine Articles, the Liturgy, and other recognized formularies of the Church; and the depository of the ultimate appellate jurisdiction in all causes and matters ecclesiastical.<sup>1</sup> All appellate authority which, previous to the Reformation, was exercised over members of the Established Church by the pope, is now by statute vested in the Crown of England; and every court, ecclesiastical or civil, held in England must be held in the name and under the authority of the sovereign.<sup>2</sup>

Legal position  
of the Estab-  
lished Church.

<sup>1</sup> Royal Declaration prefixed to the Thirty-nine Articles.

<sup>2</sup> 25 Henry VIII. c. 19; 1 Eliz. c. 1; 16 Car. I. c. 11; 13 Car. II. c. 12. See debate in House of Lords, *Hans. D.* v. 111, p. 598, on the Bishop of London's Bill on Appeals to the Privy Coun. from Eccl. Courts. The Ld. Chan. speech, in *Hans. D.* v. 168, p. 226. The Bishop of Oxford's speech, *Ib.* v. 184, p. 518. And Ld. Chanc. Cairns and Ld. Westbury, on the Supremacy of the Crown, *Ib.* v. 193, pp. 1227-1233; Montagu Burrows, *Parliament and the Church of England*, 1875.

two dioceses, including that of Sodor and Man;<sup>1</sup> the respective limits of which have been defined by Acts of Parliament.<sup>2</sup> By the laws of the realm no person can be consecrated to the office of bishop in the Established Church of England without the license of the crown to the dean and chapter for the election to that office of the person named in a letter missive accompanying the same. A royal mandate, under the great seal, for the confirmation and consecration of the proposed bishop is also necessary. And, if the dean and chapter defer or delay their election above twelve days from the receipt of the license, letters patent may be issued by the crown, conferring the episcopal office upon the nominee of the crown. The confirmation of the election of a bishop by the archbishop is simply ministerial, and merely a matter of form.<sup>3</sup> The crown has no power, by its mere prerogative, to create new dioceses, in any part of the kingdom. It must have recourse, for such a purpose, to the supreme authority of parliament. The crown, as legal head of the Church, may command the consecration of a bishop to an existing see, but it has no right to create a new ecclesiastical corporation, whose status and authority should be recognized by the community at large. Accordingly, when four new bishoprics were constituted by Henry VIII., the assistance of parliament was invoked to give effect thereto.<sup>4</sup> In 1836, when the bishoprics of Manchester and Ripon were constituted, and in 1875 upon the establishment of the see of St. Albans, and ecclesiastical jurisdiction conferred upon the bishops, it was under the provisions of an Act of Parliament.<sup>5</sup> Suffragan bishops also are appointed under authority derived from parliament; and, though the selection of two candidates for the

<sup>1</sup> [The diocese of Sodor and Man is within the province of York; it is not included in the kingdom of England and Wales.—*Editor*.]

<sup>2</sup> 6 & 7 Will. IV. c. 77; 38 & 39 Vict. c. 34; 41 & 42 Vict. c. 68.

<sup>3</sup> 25 Henry VIII. c. 20, § 14. See the case of Bishop Hampden, *Q. B. Rep.* N.S. v. 11, p. 483; and Arnould, *Life of Ch. Justice Denman*, v. 2, p. 237. And see J. W. Lea, on *The Bishops' Oath of Homage*, Rivingtons, 1875. And see Com. Debates on the Congé d'élire Bill in 1877.

<sup>4</sup> 31 Henry VIII. c. 9. This Act is not found in the ordinary ed. of the statutes, but it is cited in the judgment of the Privy Council in the case of Bishop Colenso.

<sup>5</sup> 6 & 7 William IV. c. 77; 38 & 39 Vict. c. 34. [The same course has been taken with respect to the bishoprics established since 1875.—*Editor*.]



office is vested in the particular archbishop or bishop on whose behalf a suffragan is to be nominated by the crown, it is not compulsory on the crown to choose either of them. Government may inquire as to the persons intended to be proposed as suffragans in any given case before consenting to entertain the question at all.<sup>1</sup>

All ecclesiastical synods or convocations of the Church must be convened, prorogued, dissolved, restrained, and regulated by the queen. No convocations of the bishops and clergy of the Church of England can assemble except by the express authority and command of the crown. Such authority has usually been given at the summoning of every session of parliament; and it is now agreed that the convocations, or provincial synods, of the two provinces of York and Canterbury (which are the ancient ecclesiastical councils of the archbishops) are of right to be assembled concurrently with parliament. By writs directed to the archbishops, respectively, the crown exercises the right of summoning and of proroguing convocation.<sup>2</sup> But, by the Act of Submission passed in 1532, the clergy have renounced the right to enact any new canons, constitutions, or ordinances, "unless the king's most royal assent and license may to them be had, to make, promulgate, and execute the same."<sup>3</sup> It has, indeed, been claimed, on behalf of the bishops of the Church of England, that they are at full liberty to assemble ordinary diocesan synods, to deliberate upon questions of faith and practice, but not to proceed to enact new canons, etc., without the previous license of the crown.<sup>4</sup> But this is very doubtful;<sup>5</sup> at any rate, "it is admitted that diocesan synods, whether lawful or not, unless with the license of the crown, have not been in use in England for above two centuries."<sup>6</sup>

So far, at least, as convocation is concerned, all jurisdiction that may be exercised by convocation must be subject to the

<sup>1</sup> 26 Henry VIII. c. 14; Mr. Gladstone, *Hans. D.* v. 200, p. 987.

<sup>2</sup> *Trevor on Convocations*, pp. 126, 155.

<sup>3</sup> 25 Henry VIII. c. 19. See *Hans. D.* v. 179, p. 1269; v. 180, p. 1160.

<sup>4</sup> Joyce's *Sacred Synods*, p. 40; Pro. Church Congress: York, 1866.

<sup>5</sup> See arguments in Moore's *P. C. C.*, N.S. v. 1, p. 434; and Bishop of Melbourne's Memorial, *Com. Pap.* 1856, v. 44, p. 142.

<sup>6</sup> Moore, *P. C. C.*, N.S. v. 1, p. 464.

authority and control of the sovereign. By virtue of the queen's writ of summons, convocation is empowered to deliberate upon matters affecting the interests of religion and of the Church. It is well known that, from the time of George I. (1717) until a very recent period, it was a regular practice for the crown to interpose and stop the deliberations of convocation by a prorogation, immediately after they had formally assembled. But of late years a different policy has prevailed, and it has been deemed expedient that an opportunity should be afforded to the Church in convocation to enter upon the free discussion of all ecclesiastical questions. If the crown wishes particular subjects to be discussed in convocation, "a letter of business" is issued, directing the consideration of convocation to be applied to the subjects specified therein. But another instrument, namely, a "royal license," is required by the Act of Submission to warrant convocation in enacting a new canon, or, as it is termed, "alleging or putting in use any existing ordinance or canon;" in other words, passing any judgment, opinion, or sentence upon the question that has been debated.<sup>1</sup> No ordinance or sentence agreed upon in convocation has any legal validity until it has received the sanction of the crown; and, if any attempt be made to enforce the same without such sanction, the parties concerned would incur the penalties of a *præmunire*.<sup>2</sup>

2. The principle of constitutional law which requires that the prerogative of the crown in matters ecclesiastical shall be exercised within the limits prescribed by parliament, applies with equal force to the erection of episcopal sees in the colonies of the United King-

<sup>1</sup> Upon the assembling of the convocations of Canterbury and York in February, 1872, pursuant to the queen's writ, royal letters of business, and a royal license, were severally issued for the purpose of enabling them to consider and report upon the matters contained in the Fourth Report of the Ritual Commission, and the Convocations reported thereon (*Com. Pap.* 1872, v. 46, p. 39). A Bill was afterwards passed through parliament to give effect to certain recommendations of the Ritual Commissioners, but in the House of Commons the preamble was amended, by striking out words which implied that the existing law was altered "in pursuance of a report made by convocation." It being undeniable that parliament is competent to legislate upon ecclesiastical questions without the assent of convocation (*Hans. D.* v. 211, pp. 889-897, 1088).

<sup>2</sup> *Hans. D.* v. 204, p. 1969; *Ld. Chanc. Westbury*, *ib.* v. 176, p. 1544; *Att.-Gen. (Sir R. Palmer)* *ib.* v. 180, p. 660.

dom. The Church of England, however, cannot be regarded as an Established Church in any British colony.

In crown colonies, that is to say, colonies which have been acquired by conquest or cession, and which do not possess separate legislative institutions—the legislative power being exercised by the crown, through orders in council—bishoprics may be constituted, and a measure of ecclesiastical jurisdiction conferred, by the sole authority of the crown. This has been done in the crown colonies of Ceylon, Sierra Leone, St. Helena, and the Mauritius, and also at Gibraltar. <sup>Colonial Church.</sup> In all these places episcopal sees have been established by the authority of the crown, which had a legal connection with the Church in the mother-country. But, even in the case of crown colonies, it should be remarked, that since the repeal of the Act, 1 Eliz. c. 1,<sup>1</sup> which enabled the sovereign to appoint persons who could execute all manner of ecclesiastical jurisdiction in any country belonging to the English crown, there is no power in the crown alone to create any new or additional ecclesiastical tribunal with coercive jurisdiction within the realm.<sup>2</sup> "It is a settled constitutional principle or rule of law, that although the crown may by its prerogative establish courts to proceed according to the common law, yet that it cannot create any new court to administer any other law; and it is laid down by Lord Coke in the Fourth Institute, that the erection of a new court, with a new jurisdiction, cannot be without an Act of Parliament."<sup>3</sup>

The Church of England in a crown colony is prohibited from making any regulation which is at all at variance with the ecclesiastical law of the Church in the mother-country.<sup>4</sup> Moreover, the power of the crown in any such colony must be exercised within the limits prescribed by constitutional law. Notwithstanding the opinion which has been expressed by some eminent authorities,<sup>5</sup> that the position of episcopal sees

<sup>1</sup> By the Act 16 Car. I. c. 11; and see 13 Car. II. c. 12.

<sup>2</sup> Judgmt. of P. Coun. *in re* the Bishop (Colenso) of Natal, Moore's *P.C.C.*, N.S. v. 3, p. 115; *Ib.* v. 1, p. 436. Arguments in case of Long v. the Bishop of Capetown. And see a digest of all cases and opinions on Eccles. Law applicable to the Colonies, in Forsyth, *Const. Law*, pp. 55-63.

<sup>3</sup> Judgmt. of P. Coun. in Bishop Colenso's case.

<sup>4</sup> Case of the Diocese of Colombo, *Com. Pap.* 1866, v. 49, p. 228.

<sup>5</sup> Bishop of London, *Hans. D.* v. 184, p. 511; *Ld. Carnarvon* (col. secretary), *Ib.* p. 803.

in the crown colonies is not affected by the judgment of the Privy Council in Bishop Colenso's case, it may be assumed that the power of the crown in such colonies is shown by this decision to be limited to the issue of letters patent,<sup>1</sup> sufficient in law to establish personal relations between the bishop and his clergy, as ecclesiastics, and which merely confer powers that can be enforced by mutual agreement; and that no bishop so appointed, under the provision of his letters patent, possesses any coercive legal authority whatsoever.<sup>2</sup>

Any bishop appointed by the sole authority of the crown to any colonial diocese, unless he has obtained from the Imperial Parliament, or from the local legislature, power to enforce his decrees, must resort to the civil tribunals for that purpose; and they will give or withhold their assistance accordingly as they are satisfied that he has rightly exercised his episcopal functions in the particular instance.

In the case of new settlements (not being crown colonies) and colonies which have received legislative institutions,<sup>3</sup> it is clear that the crown (subject to the special provisions of any Act of Parliament) stands in the same relation to such a settlement or colony as it does to the United Kingdom; and although it may authorize the consecration of a bishop in and for the benefit of the Church of England in any such colony, and thereby establish "personal relations" between the said bishop and his clergy, it has no power to assign him any diocese, with diocesan jurisdiction, or coercive legal authority therein, without a special Act being first passed by the imperial or colonial legislature, authorizing the issue of letters patent for that purpose. For "no metro-

<sup>1</sup> For copies of letters patent heretofore issued, creating colonial bishoprics, with or without metropolitan powers, see *Com. Pap.* 1866, v. 49, p. 181.

<sup>2</sup> The contrary opinion was maintained by Bishop Colenso, in his argument before the Supreme Court of Natal, in September, 1867, in the case of the Bishop *v.* the Dean of Maritzburg. But the judgment of the court, in January following, disallowed the act of the bishop in depriving the dean of his office, though it allowed him to assume control over the Church buildings in the diocese (*Com. Pap.* 1867-8, v. 48, p. 465).

<sup>3</sup> See Act 6 & 7 Vict. c. 13. Certain bishoprics in the East Indies were authorized to be established by the imperial Acts, 53 Geo. III. c. 155, § 49, and 3 & 4 Will. IV. c. 86, § 93. See also 5 & 6 Vict. c. 119, and 34 & 35 Vict. c. 62. The East India bishops are still appointed by the queen, by letters patent (*Com. Pap.* 1871, v. 50, p. 739).

politan, or bishop, in any colony having legislative institutions can, by virtue of the crown's letters patent alone (unless granted under an Act of Parliament, or confirmed by a colonial statute), exercise any coercive jurisdiction, or hold any court or tribunal for that purpose. Pastoral or spiritual authority may be incidental to the office of bishop, but all jurisdiction in the Church, where it can be lawfully conferred, must proceed from the crown, and be exercised as the law directs; and suspension or deprivation of office is a matter of coercive legal jurisdiction, and not of mere spiritual authority."<sup>1</sup>

Our definition of the legal status of a bishop of the Church of England, in a colony or dependency of the British crown, is taken from a judgment of the Privy Council in March, 1865, in the case of Dr. Colenso, Bishop of Natal, who was deprived of his episcopal functions—after a formal trial and condemnation for heretical opinions, before a synod of the Church in South Africa—by his metropolitan, Dr. Gray, the Bishop of Capetown. Upon the appeal of Bishop Colenso to the Privy Council, the decision of the metropolitan was set aside, upon the ground of want of the necessary authority and jurisdiction to determine upon the case.

Adverting to this judgment, it was stated by the Attorney-General in the House of Commons on March 27, 1865, that the Privy Council thereby determined (1) that no legal dioceses are created by letters patent in the colonies possessing representative institutions, or in which the Church of England had not been previously established by law; (2) that the letters patent heretofore illegally issued for the erection of episcopal sees in such colonies do not create any legal identity between the Episcopal Church presided over by these bishops, and the United Church of England and Ireland; (3) that these letters patent do not introduce into those colonies any part of the English ecclesiastical law; (4) that they confer on the bishops no legal jurisdiction or power what-

Case of Bishop  
Colenso.

Effect of the  
judgment of  
the Privy  
Council.

Colonial  
bishops.

<sup>1</sup> Privy Coun. Judgt. Bp. of Natal v. Bp. of Capetown; Judgment of Master of the Rolls, on Bp. Colenso's salary, Nov. 6, 1866; *Jurist Rep.* N.S. v. 12, p. 971. For comments on this judgment, see *Hans. D.* v. 185, pp. 386, 392; *ib.* v. 186, p. 383; and see Long v. the Bp. of Capetown, in Moore's *P.C.C.*, N.S. v. 1, p. 411; and see *Ex parte* C. A. Jenkins, Clerk, and Att.-Gen. of Bermuda, *L. T. Rep.* N.S. v. 19, p. 583.



ever; and add nothing to any authority which the bishops may be legally capable of acquiring by the voluntary principle, without any letters patent or royal sanction at all. The maximum operation of these letters patent seems to be, to incorporate the bishops and their successors, not as an ecclesiastical corporation in the colony, whose status, rights, and authority the colonies would be required to recognize; but simply as a common legal corporation, which it is in the ordinary prerogative of the crown to create, and for which no statutory powers are required.<sup>1</sup> On May 30, the colonial secretary informed the House of Commons that, upon the advice of the law officers of the crown, the government had decided that, in existing circumstances, no letters patent to bishops ought to be issued to colonies having representative institutions. In filling up a then-existing vacancy in the diocese of Rupert's Land, a letter was addressed by the Archbishop of Canterbury to the colonial secretary, upon which her Majesty was pleased to issue a mandate to the archbishop authorizing him to consecrate a bishop, but no letters patent were issued<sup>2</sup> purporting to convey jurisdiction conferred by the crown.<sup>3</sup>

The authority presumed to have been conferred upon a colonial bishop, by his letters patent, "to perform all the functions appropriate to the office of a bishop in a colony," did not "confer power to convene a meeting of clergy and laity, to be elected in a certain manner prescribed by him, for the purpose of making laws binding upon churchmen." "Such a meeting," it was held, was "not a synod, and its acts are illegal, if they purport, without the consent of the crown or the colonial legislature, to bind persons beyond its control, and to establish new courts of justice."<sup>4</sup>

In Canada, so early as the year 1855, application was made to the Imperial Parliament, by a joint address from both Houses of the Canadian legislature, for the repeal of such imperial statutes as impeded the

Colonial  
diocesan  
synods.

Episcopal  
Church in  
Canada.

<sup>1</sup> The Queen v. Eton College, 8, *Ell. and B.* p. 635.

<sup>2</sup> *Hans. D.* v. 178, p. 276; v. 179, p. 1100. See the Correspondence, and form of mandate in *Corresp. rel. to Colonial Bishoprics*, No. 1, 1866, p. 19.

<sup>3</sup> Case of Long v. the Bishop of Capetown, in Brodrick's *Judgments of the P. Coun.* p. 294.



clergy and laity of the colonial church from meeting in synod, and from electing their own bishops; but, after consulting the law officers of the crown, the secretary of state for the colonies recommended that the powers sought for should be conferred by an Act of the Canadian legislature, as had already been done in the colony of Victoria. Whereupon the Act 19 & 20 Vict. c. 141 was passed to enable the members of the Church of England in Canada to hold synods, and to elect their own office-bearers. Being reserved for the signification of the royal pleasure thereon, this Bill was disapproved by the crown law officers, who were of opinion that, in order effectually to legalize the election of Canadian bishops, an imperial statute would be requisite. The Bill, however, was referred to the Judicial Committee of the Privy Council, who, after hearing counsel on the matter, advised that it should receive the royal assent. Whereupon it was specially ratified by the queen in council.<sup>1</sup> Since the passing of this Act, the crown has deliberately surrendered the right of nominating bishops in Canada, and of approving the choice thereof by the clergy and laity.<sup>2</sup>

3. Inasmuch as the whole collective legal powers of a bishop of the Church of England, as distinguished from his spiritual powers, are derived from the crown, in conjunction with parliament, it follows that no such authority and jurisdiction can be granted out of the queen's dominions, except as the result of a special arrangement with the governing power of a foreign country; and that the authority of parliament must be invoked to enable the crown to dispense with the requirements indispensable to the ordinary appointment and consecration of bishops within the realm. Thus, in 1786, after the independence of the revolted American colonies had been established, an act was passed empowering the Archbishop of Canterbury or York, with such other bishops as they shall think fit to assist, to consecrate citizens or subjects of foreign states to the episcopal office, according to the form of consecration in the Church of

Church of  
England  
abroad.

<sup>1</sup> See *Journal Leg. Assy. Can.* 1856, pp. 259-266; *Com. Pap.* 1856, v. 44, p. 129; *Ib.* 1857, § 2, v. 28, p. 97. The Canadian statute was afterwards amended, in order to remove doubts in regard to the representation of the laity in the synods, by the Act 22 Vict. c. 139.

<sup>2</sup> *Mac. Mag.* v. 18, p. 456.

England. This act dispensed with the necessity for the royal license for the election, and of the royal mandate for the confirmation and consecration of such bishops; but it forbade any such consecration without the royal license having been first obtained for the performance of the same.<sup>1</sup> Subsequently, in the year 1841, the provisions of this Act were extended so as to admit of bishops so appointed exercising spiritual jurisdiction over the ministers of British congregations of the Church of England in foreign countries, as well as over such other Protestant congregations as may be desirous of placing themselves under their authority.<sup>2</sup> In 1862, the Bishop of Oxford submitted a Bill to the House of Lords, to authorize the appointment and consecration of bishops for heathen and Mahomedan countries with a view to the spread of the gospel among the heathen, to dispense with the necessity for any license from the crown, and to enable the archbishops to proceed to consecrate such bishops. The Bill was opposed by the lord chancellor, as being an attempt to "assail and remove the supremacy of the crown;" and because it was necessary, in order "to maintain the constitution of the country in Church and State, that no act should be done by which dignity is conferred, except under special authority emanating from the sovereign, as the source of all authority, temporal and spiritual." Moreover, there was no necessity for the Bill, as the power and authority required had been already given by the Acts of 26 Geo. III. and 5 Vict. aforesaid; and there was no difficulty in obtaining the license of the crown to proceed under those statutes. The Bill was accordingly withdrawn.<sup>3</sup>

In 1861, the bishops of the Anglican Church in New Zealand, after communication on the subject with the secretary of state for the colonies, and the attorney-general for New Zealand, consecrated a missionary-bishop for the islands of the Western Pacific, without letters patent, or any mandate from the crown, a precedent which has since been followed, without objection.<sup>4</sup>

4. By the Act 14 Car. II. cap. 4, commonly called the

<sup>1</sup> 26 Geo. III. c. 84.

<sup>2</sup> The Jerusalem Bishopric Act, 5 Vict. c. 6; and see the form of license from the crown in Stephen's *Eccles. Stat.* v. 2, p. 2150, *n.*

<sup>3</sup> *Hans. D.* v. 168, pp. 223, 234.

<sup>4</sup> *Ib.* v. 185, p. 380.

Act of Uniformity, the use of the Book of Common Prayer thereunto annexed is made binding upon the clergy <sup>Act of Uniformity.</sup> of the Church of England: and they are expressly forbidden to make use of any other form or order than what is prescribed and appointed to be used in and by the said book. A declaration of assent and consent to the said Book of Common Prayer is required to be made by all officiating ministers of the Church, together with other declarations for the maintenance of the established religion and government in church and state. This Act, however, is limited in its operation to the "kingdom of England, dominion of Wales, and town of Berwick-on-Tweed."<sup>1</sup> A similar Act was passed by the Irish Parliament.<sup>2</sup>

In conformity with the general spirit of liberality, and increased freedom of action in regard to ecclesiastical questions, which characterizes enlightened public opinion at the present day, it would appear that Parliament is not inclined to insist upon the literal observance of this statute. Thus, on August 7, 1862, inquiry being made of the government, in the House of Commons, whether a certain injunction issued by the Bishop of Oxford to his clergy was in conformity with the Act of Uniformity, the attorney-general evaded a direct answer to the question, and inclined to regard the subject-matter of the injunction "as one that concerned the bishop and his clergy, and not the government."<sup>3</sup>

In 1865, pursuant to the recommendations of a royal commission appointed to consider the terms of subscription to the articles and liturgy of the Established Church by persons admitted to holy orders <sup>New terms of clerical subscription.</sup> therein—which were previously of a very stringent character,—parliament adopted a new form of subscription, couched in general terms,<sup>4</sup> professedly in order to quiet the conscientious scruples of a large body of the clergy, and to admit of a greater latitude of opinion, in regard to many questions of faith and practice, concerning which the Church has not pronounced

<sup>1</sup> But see the previous Act on the same subject, of 1 Eliz. c. 2, which applies to the whole of "the Queen's dominions," and which has not been repealed.

<sup>2</sup> 17 & 18 Car. II. c. 6.

<sup>3</sup> *Hans. D.* v. 168, p. 1213. But see a valuable note on this point in Smith's *Parl. Rememb.* 1862, p. 180.

<sup>4</sup> By Act 28 & 29 Vict. c. 122.

authoritatively, or upon which she does not consider it to be of essential importance that her ministers should be entirely agreed.<sup>1</sup> The Act of Uniformity was amended in 1871, by the Act 34 & 35 Vict. c. 37, which directed the use of a revised Table of Lessons, in lieu of the one previously sanctioned. It was again amended in 1872, by the Act 35 & 36 Vict. c. 35, which authorized the use of certain shortened forms of divine service.

*Royal Prerogative concerning the Army and Navy.*

The existence of a military force, of greater or less extent, for purposes of protection and offence against the enemies of the state, is essential to the well-being of every community. All military authority and command within the realm is necessarily centred in the sovereign; a prerogative which, by the declaratory Act 13 Car. II. c. 6, was expressly confirmed.

The dependence of the army upon the crown, absolutely and without any qualification, has ever been regarded as the undisputed right of the occupant of the English throne.<sup>2</sup> Nevertheless, at the revolution of 1688, such limitations were imposed upon this prerogative as have rendered it impossible that it should be exercised to the detriment of English liberty. It was declared by the Bill of Rights "that the raising or keeping a standing army within the kingdom in the time of peace, unless it be with the consent of parliament, is against law."<sup>3</sup>

Parliamentary consent to the continued existence of a standing army is given only for the period of one year at a time, by a formal resolution of the House of Commons fixing the number of men of which the army shall consist. This resolution is embodied in the preamble of the annual Mutiny Act,<sup>4</sup> which recites the aforesaid provision of the Bill of Rights,

<sup>1</sup> *Hans. D. v. 179*, p. 963 (Archbishop of York); *Ib. v. 180*, p. 656 (Attorney-General Palmer). See Amos, *Fifty Years Eng. Const.* pp. 104, 109, for constitutional changes involved in modern legislation upon ecclesiastical questions.

<sup>2</sup> See Cox, *Inst. Eng. Govt.* 594. <sup>3</sup> Clode, *Mil. Forc. v. 1*, c. 5.

<sup>4</sup> The first Mutiny Act was passed in 1689. With the exception of the interval between 1698 and 1701 (*Clode*, v. 1, pp. 153, 389), it was re-enacted every session till 1879, when the Army Discipline and Regulation Act was passed in lieu of it, *vide infra*, p. 156, n.

and enacts that "whereas it is adjudged necessary by her Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom, the defence of the possessions of her Majesty's crown [and the preservation of the balance of power in Europe"<sup>1</sup>—the said force shall consist of such a number of men. Having declared the assent of parliament to the existence of an army, to be composed of a limited number of soldiers, the Act proceeds to provide for the discipline of the force by authorizing military offenders to be punished according to military law, instead of by the slow and complex process of the civil courts.

In time of war "the crown has absolute power to legislate for the government of the army,"<sup>2</sup> though, as we shall presently notice, that power has fallen into desuetude. In time of peace the crown can only frame laws and regulations for the government of the army and navy by express authority of parliament. Thus, the articles of war for the discipline and government of the army are made in pursuance of the annual Mutiny Act, the first section whereof authorizes the crown to frame those articles. But it is expressly declared that this supplemental legislation shall be legal only so far as it is in accordance with the provisions of the Mutiny Act.<sup>3</sup>

In the years immediately following the revolution, the Mutiny Acts dealt exclusively with the matter of discipline, and the parliamentary sanction to the continuance of the army itself was given by resolution of the House of Commons in committee of supply, determining the number of men to be employed, and voting the money required for their maintenance and support. On two occasions during the reign of William III., the House of Commons reduced the number of the standing army by their resolutions in this committee, and one of these instances occurred at the time when there was no Mutiny Act in operation.<sup>4</sup> By modern practice, the numbers of men to be

<sup>1</sup> The words between brackets—which were first inserted in 1727, and continued thenceforth until 1868—have been since omitted (*Hans. D. v.* 191, pp. 326, 557).

<sup>2</sup> See charge of Ch. Just. Cockburn, in the *Queen v. Nelson and Brand*, pp. 69, 87–91. In time of war, the crown acts out of the limits of its dominions as regards the army, by virtue of its prerogative (*Barwis v. Keppel*, 2 Wilson, p. 314).

<sup>3</sup> *Queen v. Nelson and Brand*, p. 69; 29 Vict. c. 9, sec. 1.

<sup>4</sup> Hallam, v. 3, pp. 189, 190.



employed both in the army and navy are annually fixed by resolutions in committee of supply, and afterwards included, in respect to the army in the Mutiny Act, and in respect to the navy in the Act of Appropriation; thus obtaining, for the resolutions of the Commons in limitation of the amount of force to be in the hands of the crown, the consent of the other branches of the legislature.<sup>1</sup>

It is worthy of remark that the declaration of the Bill of Rights, as to the illegality of keeping a standing army without the consent of parliament, is expressly confined to "the time of peace." Moreover, the Mutiny Act, in conferring extraordinary powers for the discipline of the army is construed to mean that, except "in time of peace," the enforcement of military law upon military men is not illegal. Accordingly, the royal prerogative, in respect to the embodiment and control of an army and generally for the defence of the realm in times of rebellion or foreign invasion in time of war, remains unimpaired by these constitutional restrictions, and is still the same as it was by the common law.<sup>2</sup> What that law allowed is, however, no longer material to inquire, inasmuch as the monarchs of England, ever since the revolution, have been satisfied to rely upon the authority of the Mutiny Act for the enforcement of discipline in the army both in war and peace, and have been equally dependent at all times upon the necessity of obtaining from parliament, year by year, the supplies required for the prosecution of any war in which Great Britain might be engaged.

Thus military law is a branch of the law of the land applicable only to certain acts of a particular class of persons, and administered by special tribunals. It is based

<sup>1</sup> Clode, *Mil. Forces*, v. 1, pp. 86, 104; Second Rpt. Courts Martial Comms. *Com. Pap.* 1868-9, v. 12, p. 408. In lieu of the annual Mutiny Act, parliament passed an Act in 1879 called the Army Discipline and Regulation Act, which embodied various customs and rules which had gradually been adopted. Further regulations were afterwards made, and in 1881 another Act was passed in which these were consolidated, whilst the former statute was revised and re-enacted. The Regulation of the Forces Act and the Army Act of 1881 now include all previous laws and regulations on the subject. In 1882 these acts were amended by the Army (Annual) Act, by the Military Manœuvres Act, and by the Reserve Forces Act, all passed in that year. An Act to consolidate the law relating to the militia was also passed in 1882.

<sup>2</sup> Clode's *Military Forces of the Crown*, v. 1, pp. 1-6, 10.



upon rules for the government of the army and navy which have been framed or sanctioned by successive Acts of Parliament. Courts-martial for the trial of military offences are, therefore, a part of the recognized judicatures of the realm, whose jurisdiction is confined to the military and naval forces of the crown.<sup>1</sup>

Military law, however, must not be confounded with martial law, and martial law, in the sense in which the term is popularly understood, is unknown to the law of England. Martial law is, in fact, the assumption of arbitrary power over all persons in any district wherein martial law has been proclaimed, for the purpose of quelling an armed insurrection against the constituted authorities. And it is conclusively shown by Sir A. Cockburn, in his luminous and elaborate charge in the case of *Regina v. Nelson and Brand*,<sup>2</sup> that the crown, in its constitutional capacity, has no inherent prerogative to proclaim martial law, as applicable to the inhabitants of the country generally, or to any particular district thereof, in any circumstances or conditions whatsoever, and that martial law cannot be enforced within the realm of England except by authority of parliament.

In case of riot or insurrection the magistrates are authorized, by the Riot Act, to call in the aid of the military power to act in aid of and under the civil power, for the suppression of the same.

If a rebellion or invasion occurs, the crown has a common-law right and is imperatively required to put it down by military force. But all prisoners who are taken at such times must be tried before the ordinary tribunals; unless parliament has interposed, at this particular juncture, by passing a law authorizing a summary mode of procedure against persons implicated in these grave offences.

The chief justice (Cockburn) admits that "where illegal force is resorted to for the purpose of crime, you may meet

<sup>1</sup> Forsyth, *Const. Law*, pp. 208, 210. The Mutiny Act passed in 1877, provided, for the first time—pursuant to the recommendations of a War Office committee in November, 1876, on the Militia Acts—that officers of the militia, yeomanry, and volunteer corps should be subjected to the operation of that Act, and of the Articles of War—not only when embodied and out for training, but at other times (*Hans. D.* v. 232, pp. 1401, 2019; v. 233, p. 817; Act 26 & 27 Vict. c. 65, § 21; 40 Vict. c. 7, § 2).

<sup>2</sup> Published and edited by W. F. Cockburn. London: 1867.

that illegal force by force, and may repress and prevent it by any amount of force that may be necessary for the purpose;" as, for example, "if a mutiny breaks out on board ship, immediate force may be resorted to; you may quell the mutiny if necessary by killing those engaged in it." "But this is not what can properly be called martial law." It is "the law of necessity," which "is part and parcel of the law of England." The question really is, "whether for the suppression of a rebellion, you may subject persons not actively engaged in it, and whom you therefore cannot kill on the spot, to an anomalous and exceptional law, and try them for their lives without the safeguards which the law ought to afford."<sup>1</sup> To say that "the necessity of suppressing rebellion is what justifies the exercise of martial law"—in the sense of an arbitrary, illegal, and irregular interposition of authority—is a "fearful and odious doctrine. There are considerations more important even than the shortening the temporary duration of an insurrection. Among them are the eternal and immutable principles of justice, principles which can never be violated without lasting detriment to the true interests and well-being of a civilized community."<sup>2</sup>

The weighty arguments contained in this charge<sup>3</sup> induced the grand jury in a presentment in this case to express a hope that martial law, as it is called, might be more clearly defined by legislative enactment,<sup>4</sup> and on May 6, 1867, inquiry was made of ministers whether they proposed in any manner to act upon this recommendation. It was replied that, previous to the aforesaid presentment, the secretary of state for the colonies had directed a circular to colonial governors, which expresses the views of her Majesty's government on the subject of martial law.<sup>5</sup>

By this circular, which is dated January 30, 1867, an extract is communicated from a despatch addressed to the Governor of Antigua, in reference to an act in that colony, "which purports to invest the executive government with a permanent power of suspending the ordinary law of the colony, of removing the known safeguards of life and property, and of

<sup>1</sup> Cockburn's *Regina v. Nelson and Brand*, pp. 85, 86.

<sup>2</sup> *Ib.* p. 108.

<sup>4</sup> *L. T.* v. 42, p. 474.

<sup>3</sup> *Ib.* pp. 85, 86, 108.

<sup>5</sup> *Hans. D.* v. 187, p. 3.

legalizing in advance such measures as may be deemed conducive to the establishment of order by the military officer charged with the suppression of disturbances," and which is declared to be "entirely at variance with the spirit of English law." Instructions are given to cause to be submitted to the legislature an act for the repeal of this law, because "in no colony" should the power given by the said law "be suffered to continue."

The circular adds that, in giving these instructions, "her Majesty's government must not be supposed to convey an absolute prohibition of all recourse to martial law, under the stress of great emergencies, and in anticipation of an act of indemnity. The justification, however, of such a step must rest on the pressure of the moment, and the governor cannot by any instructions be relieved from the obligation of deciding for himself, under that pressure, whether the responsibility of proclaiming martial law is or is not greater than that of refraining from doing so."<sup>1</sup>

This despatch has probably led to the repeal of all colonial acts under which a standing power is conferred upon the governor to proclaim martial law. Such acts were in existence in Antigua and Bermuda, and presumably in Jamaica also.<sup>2</sup> This will materially diminish the opportunities for the abuse of this power in the event of sudden outbreaks, and necessitate an immediate recourse to the local legislature either for the purpose of obtaining authority to proclaim martial law, or for indemnity for acts done in anticipation of such authority. Moreover, in addition to the above-mentioned despatch, confidential instructions<sup>3</sup> have been sent out by the Colonial Office to colonial governors for their guidance in case of insurrection or emergency beyond the reach of ordinary law. But it is thought that it will be necessary to have some further legislation on the subject, in the way of giving larger powers of arrest in cases of necessity.<sup>4</sup>

<sup>1</sup> Circular despatch to colonial governors, *Com. Pap.* 1867, v. 49, p. 325; *Queen v. Nelson and Brand*, p. 74, *n.*; Mr. Justice Blackburn's charge in the case of Gov. Eyre, in June, 1868.

<sup>2</sup> *Hans. D.* v. 188, p. 904.

<sup>3</sup> *Ib.* p. 1724.

<sup>4</sup> *Ib.* p. 268. For precedents of the proclamation of martial law in the colonies from 1805 to 1863, see Clode, *Mil. Forc.* v. 2, p. 481.

All ministers of the crown, through whose instrumentality resort should be had in any circumstances to martial law, are responsible to parliament for their conduct, and must be able to justify the necessity for their acts under penalty of censure, removal from office, or impeachment, if it should prove upon investigation that their proceedings had been uncalled for or unwarrantably severe.<sup>1</sup>

Ministers responsible for the same.

It is one of "the ancient rights and liberties" of Englishmen to "have arms for their defence, suitable to their condition, and as allowed by law;" and the fundamental laws of the kingdom have repeatedly affirmed the obligation of every Englishman to have a knowledge of the use of arms, in order that he may assist in preserving the public peace.<sup>2</sup> Hence the militia has always been regarded as the constitutional force for the defence of the realm, and one of the earliest Acts of Parliament after the restoration of the monarchy in 1660 was for the settlement of the militia upon a constitutional basis. By the Militia Laws Consolidation Act, passed in 1786, it is declared that "a respectable military force, under the command of officers possessing landed property within Great Britain, is essential to the constitution of this realm."<sup>3</sup>

The militia.

Upon a similar principle, the formation of volunteer corps in Great Britain has taken place under the direct authority of Acts of Parliament, which permit the sovereign to accept offers of military service from the people, under certain conditions.<sup>4</sup> The volunteer movement, which has since assumed such important dimensions, originated in the spring of 1859, when General Peel, the then secretary for war, issued two circulars, the first of which declared the readi-

Volunteer corps.

<sup>1</sup> *Hans. D. v.* 184, pp. 1803, 1893. For arguments on constitutional restrictions upon the crown in proclaiming martial law, see *Law Mag.* v. 12, p. 170, on Martial Law in Australia; and articles on Jamaica case, in *The Jurist* for Jan. 6, April 7, June 30, July 21 and 28, 1866; and see the evidence given by the Atty.-Gen. for Jamaica, *Com. Pap.* 1866, v. 31, p. 331.

<sup>2</sup> *Smith's Parl. Rememb.* 1859, pp. 108-112; *Corresp. Will. IV. with Earl Grey*, v. 1, p. 416.

<sup>3</sup> *Clode, Mil. Forces*, v. 1, c. 3 & 14. But this principle has been modified in practice by the Army Regulation Act, 1871 (*Hans. D. v.* 207, p. 1560).

<sup>4</sup> *Stats.* 44 Geo. III. c. 54; 60 Geo. III. c. 1; *Clode, Mil. Forces*, v. 1, pp. 86, 333.

ness of government to accept the service of volunteer corps, offered under the old Volunteer Act of the 44 George III., and the other set forth the circumstances in which the government was prepared to accept the same.

Such being the well-ascertained rights of the crown in regard to the levy, direction, and maintenance of a military force for the protection and defence of the empire, it remains to consider how far the Houses of Parliament are constitutionally competent to interfere therein.

We have already seen<sup>1</sup> that the control of the army and navy was the last of the prerogatives to be sur-

Responsibility  
of ministers  
for the control  
of the army  
and navy.

rendered into the custody of responsible ministers. Even of late years there have been those who have contended that the administration of the military and naval forces of the kingdom should remain altogether in the hands of the executive, without any interference by either House of Parliament.<sup>2</sup> But sound doctrine forbids a distinction to be drawn between the exercise of the royal authority over the army and navy and over other branches of the public service; upon all alike it is equally competent for either House of Parliament to tender its advice, and there can be nothing done in any department of state for which some minister of the crown is not accountable to parliament.

The complete responsibility of ministers for the control of the military force having been established beyond dispute, it follows that they must be held accountable to parliament for their proceedings in this as in other matters.<sup>3</sup> But, as the command of the army and navy is the peculiar privilege and strength of the executive power, it is essential that the scrutiny of parliament into military affairs should be cautiously and sparingly exercised, lest the constitutional limits of inquiry and counsel should be overstepped, and the functions of executive authority be encroached upon.<sup>4</sup> The constitutional security against an abuse of this prerogative is found in the general responsibility of ministers, and the necessity for the sanction of parliament to the continued existence of the army and navy,

Parliamentary  
control over  
this pre-  
rogative.

<sup>1</sup> *Ante*, p. 64.

<sup>2</sup> *Hans. D.* v. 75, p. 1289; Clode, *Mil. For.* v. 1, p. 84.

<sup>3</sup> *Ib.* v. 2, p. 69.

<sup>4</sup> *Ib.* v. 2, p. 422.



by the annual appropriations for the support of these services, and the annual renewal of the Mutiny Acts.<sup>1</sup>

Parliament has an unquestioned right to interfere, by enquiry, remonstrance, and censure, in all cases of abuse, whether on the part of individual military officers or of executive departments.<sup>2</sup> It has a right to inquire into the causes and consequences of any disasters that may befall our arms in the prosecution of contests against the queen's enemies. It may call ministers to account for placing any officers upon half pay, otherwise than as a reward for past services, and a retainer for future services, if required.<sup>3</sup> It has a right to discuss and advise upon all general questions affecting the well-being of the army and navy, their internal economy or efficiency; although great discretion and forbearance are necessary in the exercise of this right.<sup>4</sup>

It is essential to the constitution of a military body that the crown should have the power of appointing, promoting, or reducing to a lower grade, or of altogether dismissing, any of its officers or men<sup>5</sup> at its own discretion, and without assigning any reason for the act; such power being always exercised through a responsible minister, who is answerable to parliament, if it should appear to have been exercised unwarrantably, and upon an insufficient ground.<sup>6</sup> But it would be a dangerous assumption of power for either House of Parliament to interfere in a matter affecting the discipline or command of the army or navy, in any individual instance;<sup>7</sup> or to institute an inquiry into the causes which affect the promotion of particular officers;<sup>8</sup> or to revise the decision of the War Office or of

<sup>1</sup> Clode, *Mil. Forc.* v. 1, p. 190; May, *Parl. Practice*, 1883, p. 659.

<sup>2</sup> See *Hans. D.* v. 180, pp. 369-400, on a motion to resolve that the practice of appointing naval officers as dockyard superintendents, and of limiting their term of office to five years, is inexpedient.

<sup>3</sup> Clode, *Mil. Forc.* v. 2, p. 98; *Hans. D.* v. 224, p. 1428.

<sup>4</sup> *Hans. D.* v. 89, p. 1069; *Ib.* (Ld. Stanley) v. 167, p. 211; *Ib.* v. 164, p. 625; *Ib.* (Ld. Palmerston) v. 169, p. 751.

<sup>5</sup> As to authority for dismissing private soldiers, see *Hans. D.* v. 186, p. 732.

<sup>6</sup> *Ib.* (Ld. Hardwicke) v. 170, p. 382; *Ib.* (Ld. Palmerston) v. 180, p. 456; *Ib.* (Gen. Peel) v. 189, p. 1017.

<sup>7</sup> *Mir. of Parl.* 1837, p. 861; *Ib.* 1841, p. 835 (Ld. Lucan's case); *Hans. D.* v. 137, p. 1333; Macaulay's speech, *Ib.* v. 84, p. 890; Gen. Peel's speech, *Ib.* v. 174, p. 36.

<sup>8</sup> *Mir. of Parl.* 1837, p. 574; *Ib.* 1839, p. 2810. Proposed address retirement of old naval officers with a view to promotion of young and



the Admiralty as to the pay, pension, allowances, or retirement of individual officers;<sup>1</sup> or into the bestowal of military rewards or punishments to particular persons;<sup>2</sup> or to review the decisions of courts-martial, and the action of the military or naval authorities in relation thereto;<sup>3</sup> except in cases where either malversation, corrupt motives, or gross violation of the law is distinctly chargeable.

"There is no precedent, either in the army or navy, for producing [to parliament] a copy of the report of a Court of Inquiry.<sup>4</sup> Neither should either House of Parliament assume the right of inquiring into the most suitable and efficient weapons for use in the army and navy, unless invited by the government to institute such an investigation.<sup>5</sup>

Parliamentary investigation and control.

It has also been repeatedly held that parliament has no right to ask for information as to the distribution or movement of troops, whether in times of peace or of war; but such information has been occasionally communicated, and since 1865 has been regularly supplied through the monthly army lists.<sup>6</sup>

And here it may be observed that, prior to the establishment of the railway system, all the highways in the kingdom were assumed to be vested in the sovereign, for the use of the crown and people. And the sovereign had a prerogative right to the use of these highways, and of carriages and horses in the vicinity, at statutory rates, for the passage of troops or military

active men, *Hans. D.* v. 69, p. 483; and see *Ib.* v. 137, p. 1191; v. 164, p. 876; v. 232, p. 1261. But in 1853 a committee of inquiry was appointed by the House of Commons into the case of Lieut. Engledue, it being alleged that he owed his restoration to the service to corrupt influences (*Com. Pap.* 1852-3, v. 25, p. 471; *Hans. D.* v. 189, p. 333).

<sup>1</sup> Palmerston, *Hans. D.* v. 145, p. 477; Clode, *Mil. Forc.* v. 1, p. 97; *Hans. D.* v. 203, p. 116.

<sup>2</sup> Macaulay, in *Mir. of Parl.* 1841, p. 1687; Wellington, *Hans. D.* v. 82, p. 720; Clode, *Mil. Forc.* v. 2, pp. 326-330; Case of Capt. King (Army prize money), *Parl. D.* v. 23, p. 1046; *Hans. D.* v. 74, p. 58; v. 164, p. 994; v. 167, p. 793.

<sup>3</sup> *Mir. of Parl.* 1831-2, p. 2955; *Ib.* 1834, p. 2121; *Ib.* 1835, p. 2344; *Ib.* 1841, p. 835; *Hans. D.* v. 171, pp. 974, 1045. And discussions on Lt.-Col. Dawkins' case, *Ib.* v. 179, pp. 642, 879; v. 180, p. 456; *L. J. Rep.* N.S. v. 34, p. 841; Thomas, *Const. Law*, p. 69; *Hans. D.* v. 193, pp. 920, 958; Clode, *Mil. Forc.* v. 1, pp. 188-190.

<sup>4</sup> Mr. Hunt (1st Ld. Admiralty), *Hans. D.* v. 232, p. 1976.

<sup>5</sup> *Ib.* v. 163, pp. 1569-1581.

<sup>6</sup> Clode, *Mil. Forc.* v. 2, pp. 331-333.

stores thereon. The actual rights of the crown to the use of railways in peace or on occasions of public emergency are defined in a War Office memorandum on the subject, dated April, 1876.<sup>1</sup>

Parliament has a right to call for full information in regard to military matters, for the purpose of enabling it to vote with discretion and intelligence upon the naval and military estimates. But this right must not be held to justify an unseasonable interference in respect to the details of military administration. For example, it is an "invariable rule, founded on the best possible reasons, never to publish instructions sent to naval and military officers, until the operations to which they referred were completed, and not often in that case:"<sup>2</sup> or, to present papers concerning a rebellion or war in which the country is engaged, until peace is restored:<sup>3</sup> or, to make public reports from military officers in the colonies to the military authorities at home, except at the discretion of the government:<sup>4</sup> or, to give information as to the mode in which honours are distributed in the army.<sup>5</sup>

If it be necessary at any time to institute minute inquiries into matters connected with the internal economy of the army or navy, such inquiries, it has been authoritatively stated, "ought to be made by a commission emanating from the crown and reporting to the crown, which report might afterwards be communicated to the House of Commons for any purposes which the House might require. But I think this House is not the authority which ought properly to institute any inquiries of this kind."<sup>6</sup> It is perfectly competent, however, for parliament to address the crown to appoint a commission for such a purpose.<sup>7</sup>

<sup>1</sup> *Com. Pap.* 1877, v. 50, p. 749.

<sup>2</sup> *Ld. Palmerston, Hans. D.* v. 172, p. 659.

<sup>3</sup> *Hans. D.* v. 102, pp. 1185, 1333.

<sup>4</sup> *Mir. of Parl.* 1837-8, p. 1528.

<sup>5</sup> *Ib.* 1837, p. 603. But verbal explanations may be asked for on such points (see *Hans. D.* v. 178, p. 1598; *Ib.* v. 179, p. 47).

<sup>6</sup> *Ld. Palmerston, Hans. D.* v. 137, p. 1241. [And see his speech on promotion and retirement in the navy, *Ib.* v. 169, p. 749.] This opinion was afterwards corroborated by Mr. Disraeli, *Ib.* v. 161, p. 1868; v. 170, p. 875. See a debate on a change in the system of promotion among army medical officers, *Ib.* v. 183, p. 585.

<sup>7</sup> *Ib.* v. 172, p. 794.

*Royal Prerogative in regard to Offices and Public Officers.*

The crown, besides being the fountain of dignity and honours, is likewise entrusted by the constitution with the sole power of creating such offices, for carrying on the public service, or maintaining the dignity of the state, as may be required. It has also, by virtue of the prerogative, a right to make choice of all persons to be appointed to fill places of trust and emolument under the crown;<sup>1</sup> and to dismiss them from office, according to its discretion.

Prerogative in regard to offices and public officers.

In former times, and even so recently as the reign of George III., the patronage of the crown was oftentimes shamefully abused. Persons were appointed to places of trust and emolument, or removed therefrom, on mere political grounds, and in furtherance of political intrigues. Even persons holding non-political offices, such as lords-lieutenant of counties, or having commissions in the army and navy, were occasionally dismissed by order of the king, for votes given in parliament.<sup>2</sup>

Abuse of patronage.

Public offices.

Sinecure offices, gifts of places in reversion, and secret pensions for political services to the court were multiplied; and the illegitimate influence of the crown was thereby greatly increased. But, chiefly through the patriotic labours of Edmund Burke, these evils were exposed and remedied. Acts of Parliament were passed in the early part of the reign of George III. to abolish sinecures, to regulate the grant of offices, and to reform abuses connected therewith. Since the commencement of the present century, a marked improvement has taken place in the practice of governments, and in the tone of public opinion, respecting the distribution of patronage. No minister would now venture to incur the responsibility of abusing the prerogative, in the choice and dismissal of servants of the crown, by such acts as were committed with impunity less than a century ago.

The most important rule of modern times, in regard to the civil servants of the crown, is that whereby they have been

<sup>1</sup> Macaulay, *Hist. of Eng.* v. 4, p. 303.

<sup>2</sup> May, *Const. Hist.* v. 1, pp. 24, 29, 40; Ewald, *Life of Walpole*, p. 247.

divided into two classes—political and non-political, of which the former is supreme, and the latter subordinate. The former consists of cabinet ministers and other members of the administration, and the latter of the permanent members of the civil service,<sup>1</sup> who have been, for the most part, excluded from the House of Commons by express statutes. Their exclusion from the political arena is the price they pay for their tenure of office, being virtually that of good behaviour. For whether they were originally appointed for political reasons, or otherwise, nevertheless, “as a general rule, the civil servants who do not sit in parliament, hold their offices technically and legally during the pleasure of the crown, but are in practice considered as having a right to remain in undisturbed possession of them, so long as they continue to discharge their functions properly. This principle is so universally recognized, that the dismissal of a person holding a permanent office is never heard of now, except for misconduct.”<sup>2</sup>

Although appointments to office under the crown are made in the name of the sovereign, it is contrary to the spirit of the constitution for any such appointments to be made except through a responsible minister. In selecting individuals to fill subordinate places of honour and emolument, a great responsibility devolves upon the existing administration. Public opinion will no longer tolerate the prostitution of offices for political services that so often disgraced our history in former times. It is now an admitted necessity, that every one appointed to an office of trust, however small, should be qualified for his post. But, so long as this principle is not lost sight of, it is acknowledged to be the privilege of an administration to give the preference, in appointments to office, to their political friends and supporters; for, among the powers that are required to enable a government to perform

<sup>1</sup> Upon this principle a parliamentary under-secy. takes precedence, in rank and responsibility, over a permanent under-secy., however dependent the former may be upon the latter on his first appointment for guidance and information (Rep. Com<sup>o</sup>. on Diplomatic Service, *Com. Pap.* 1871, v. 7, pp. 295, 339).

<sup>2</sup> Grey, *Parl. Govt.* new ed. p. 287; *Com. Pap.* 1854-5, v. 20, p. 193.

its functions with efficiency, there are few more essential than that of reward.<sup>1</sup> "The patronage of the crown," says May,<sup>2</sup> "has ever been used to promote the interests and consolidate the strength of that party in which its distribution happened to be vested." It is true that the offer of places, as a corrupt inducement to vote at elections, has long been recognized by the legislature as an insidious form of bribery.<sup>3</sup> But, while carefully avoiding the committal of any offence against the law, the patronage of the crown within certain limits—to be presently noticed—has been systematically, though not invariably, distributed by the ministry of the day, "as a means of rewarding past political service, and of ensuring future support."

Patronage.

We now proceed to notice the exceptions to this practice, which are both numerous and important.

Non-political appointments.

In the first place, in the disposal of the ecclesiastical patronage of the crown, it is not the rule that it should be generally given to partisans of the existing government. Appointments to bishoprics, and other dignified offices in the Church, are usually made upon the recommendation of the prime minister, and he is careful to consult the general interests of the Church, in such nominations, without reference to mere political or sectional opinions.<sup>4</sup> The lord chancellor has the distribution of a very large amount of inferior Church patronage, which he is free to dispose of "according to his notions of what is due to religion, friendship, or party;"<sup>5</sup> but as a rule the distribution of Church patronage by ministers of the crown is not influenced by political considerations.<sup>6</sup>

In the Church.

In the appointment, or promotion, of naval and military officers, and of persons employed in the civil branch of the Admiralty, political distinctions are almost invariably overlooked. It is universally recognized as

In the army and navy.

<sup>1</sup> Grey, *Parl. Govt.* p. 311; Rowland's *Eng. Const.* p. 437.

<sup>2</sup> May, *Const. Hist.* v. 2, p. 91.

<sup>3</sup> 2 Geo. II. c. 24; 49 Geo. III. c. 118, etc.; *Rogers on Elections*, 316-347.

<sup>4</sup> See Rep. on Off. Salaries, *Com. Pap.* 1850, v. 15; Ld. John Russell's *Evid.* 309, 1282.

<sup>5</sup> Ld. Campbell's *Lives of Chan.* v. 1, p. 20.

<sup>6</sup> Lord Granville, *Hans. D.* v. 207, p. 1865.



the duty of those who are entrusted with the patronage of the crown, to be guided in the distribution of promotion and professional employment in the army and navy by the rules of the service and the merits of the case, and to permit no interference by members of parliament to influence them in such matters.<sup>1</sup>

In the appointment or retention in office, upon a change of ministry, of ambassadors or ministers abroad, and other members of the diplomatic service, their personal fitness is solely considered irrespective of their political opinions, which practically are never found to interfere with the impartial discharge of their official duties.<sup>2</sup>

It is the same with regard to appointments to judicial offices.

Judicial offices. With the exception of the office of lord chancellor, which is political and ministerial, and of the post of chief justice of the Queen's Bench, which is usually conferred upon the law officers of the crown, no such principle would be permitted to prevail in England, as that seats upon the bench should be given to political partisans.<sup>3</sup> In Ireland, it is true, a greater laxity on this point has prevailed; and while the Derby administrations, in 1852 and 1858, afforded examples of promotion from the Irish bar of political opponents of the government, yet "no doubt, in Ireland, promotions to the bench have been made in general, by both sides, on party grounds."<sup>4</sup>

Subordinate offices in the superior courts of justice in England are in the gift of the heads of the several courts, to whom such officers are responsible for their proper conduct.<sup>5</sup> A different practice prevailed in Ireland, where, by an ancient prerogative of the crown, certain of these appointments were conferred by the lord-lieutenant. But in 1871 this judicial patronage was conferred upon the judges, save

<sup>1</sup> Grey, *Parl. Govt.* p. 160; *Com. Pap.* (on Admiralty) 1861, v. 5, pp. 52, 109; Clode, *Mil. Forc.* v. 2, p. 741.

<sup>2</sup> Lord Derby, Rep. Diplomatic Service, *Com. Pap.* 1870, v. 7, pp. 465, 471, 483.

<sup>3</sup> Yonge, *Life of Ld. Liverpool*, v. 1, p. 265; *Hans. D.* v. 173, p. 205.

<sup>4</sup> *Ib.* v. 173, p. 205; v. 220, p. 430.

<sup>5</sup> Question raised as to proper exercise of judicial patronage in appt. of clerk of assize, *Hans. D.* v. 192, pp. 343, 497; in the appt. of revising barrister, *Ib.* v. 198, pp. 1487, 1535, 1541; in appt. of official referees under Judicature Act, *Ib.* v. 229, p. 1309.



only that junior clerkships in the courts are now filled up by open competition.<sup>1</sup>

As respects civil service nominations, for minor appointments to office, before the introduction of the competitive system, Lord Palmerston has testified that they were "often given without regard to political considerations."<sup>2</sup>

Promotions in the civil service are wholly uninfluenced by party motives.<sup>3</sup> In fact, stringent regulations have been adopted and enforced by government to discountenance attempts on the part of public officers to obtain promotion by such means. Circulars have been addressed to members of parliament by the heads of the principal administrative departments, calling attention to orders in council, which strictly forbid the endeavour to interest members of parliament in applications for promotion or pecuniary advancement, and declaring that any attempt to obtain promotion by political or other indirect influence will be punished. These measures, coupled with the general adoption of the system of competitive examinations, in appointments to office, have done much to prevent the abuse of patronage for party purposes.

The right of making appointments in the public service has been, in certain cases, expressly conferred upon the crown by statute. Nevertheless, since the introduction of the competitive system, appointments are ordinarily conferred only in accordance with the provision of orders in council regulating the same. But so long as the statutes are unrepealed, the crown possesses a reserved right to exercise the statutory power in such cases, and to set aside, at its discretion, the regulations established by order in council.<sup>4</sup>

The entire patronage of the crown in Great Britain was computed in 1863 at about 105,000 offices.<sup>5</sup> It included

<sup>1</sup> *Hans. D. v. 189*, pp. 842, 1602. But see 34 & 35 Vict. c. 72, § 14; *Hans. D. v. 235*, p. 1572.

<sup>2</sup> *Ib. v. 172*, p. 968; *v. 187*, p. 621.

<sup>3</sup> *Ib. v. 207*, p. 1865.

<sup>4</sup> Sir W. Dunbar, Rpt. Pub. Accts. Com. Pap. 1874, v. 6, pp. 37, 50.

<sup>5</sup> *Hans. D. v. 172*, p. 956. Of this number it is stated that the *employés* of the civil service amounted, in 1862, to 43,163, while in 1822 they were only 18,500 (*Ib. v. 176*, p. 1944). But of late years the *employés* in the civil service have considerably increased (*Ib. v. 193*, p. 1187). In 1873 they were computed to number 43,569 (irrespective of civilians in military and naval depts.) (*Hans. D. v. 214*, p. 643). [The development of the

first appointments to minor and subordinate offices, and (nominations) under the competitive examination system, until that gave place to "open competition."

Crown patronage, its extent and distribution.

The system of competitive examinations, to which reference has already been made, was introduced for the express purpose of doing away with abuses in regard to patronage. In some departments open competition was the rule from the first; in others a limited competition among three candidates. In the civil and medical services of India,<sup>1</sup> the army generally, certain naval establishments, and nearly all the civil departments of the state, open competition was established, and thereby ceased to afford patronage to ministers.

Competitive examinations for civil service.

As a necessary consequence of the division of the civil service into political and non-political officers, and of the acknowledged supremacy of the members of the administration over all the subordinate *employés*, it is required by our parliamentary system that every branch of the public service should be represented, either directly or indirectly, in the Houses of Parliament. This duty is performed by the political heads, who are themselves solely responsible for every act of administration down to the minutest details of official routine. Having entire control over the public departments, they are bound to assume responsibility for every official act, and not to permit blame to be imputed to any subordinate for the manner in which the business of the country is transacted, except only in cases of personal misconduct, for which the political chiefs have the remedy in their own hands.<sup>2</sup>

Representation in parliament of every public department.

"It is no arbitrary rule," says Lord Grey, "which requires that all holders of permanent offices must be subordinate to some minister responsible to parliament, since it is obvious that without it, the first principle of our system of government—the control of all branches of the administration by parliament—would be abandoned."<sup>3</sup>

Subordination of all permanent officers to some political head.

Porter Service and other kindred departments has increased, and must increase, the number of such officials.—*Editor.*]

<sup>1</sup> As to working of system in India, see *Com. Pap.* 1870, v. 7, p. 449.

<sup>2</sup> For further particulars on this head, see *post*, pt. iii. ch. I., on the Cabinet Council.

<sup>3</sup> Grey, *Parl. Govt.* new ed. p. 300.

So strict is the rule of ministerial supremacy as to forbid any orders to be given to any public servant of the crown, by either House of Parliament, except through the regular channel of official communication, namely, a secretary of state, or other officer who may be authorized to convey the royal commands.<sup>1</sup>

So, also, as regards the dismissal of persons from public employment; the crown possesses by virtue of its prerogative an absolute legal power to dismiss any of its servants holding office "during pleasure," on the advice of its responsible ministers.<sup>2</sup> Such a power "is indispensable, in order to give to the latter that authority over those by whose agency and assistance they carry on the public business, without which they could not justly be held accountable by parliament for the manner in which affairs are conducted."<sup>3</sup>

Absolute power in the crown to dismiss all public servants.

But while every government must necessarily possess the abstract right of dismissing any of its servants who may hold their offices "during pleasure," whenever they consider that such a step is required by the exigencies of the public service, it has nevertheless been recognized as a rule that persons holding non-political offices under the crown should only be dismissed for incompetence or misconduct.<sup>4</sup> Dismissals on other grounds are highly objectionable and inexpedient; more especially if they spring from political considerations. Doubtless, an active interference in politics, on the part of a non-political officeholder, would be a case of "misconduct" sufficient to justify his dismissal. It is a well-understood rule of constitutional government, that all such functionaries "should abstain from taking an active part in political contests," observing a strict neutrality therein. If a contrary practice prevailed, it would

Dismissals only occur for incompetence or misconduct.

<sup>1</sup> Case of Sir Baldwin Walker, *Hans. D.* v. 161, pp. 1631-1641; v. 162, pp. 235-247.

<sup>2</sup> *Chitty on Prerog.* p. 82. See the case of Lord Howe in *Mir. Parl.* 1831, p. 3127; case of Sir S. Robinson, *Hans. D.* v. 205, p. 1324; case of Surgeon-Major Tufnell, *L. T. Rep. N.S.* v. 34, p. 838. As regards officers in the navy, army, or militia, see *ante*, p. 162.

<sup>3</sup> Grey, *Parl. Govt.* new ed. p. 326. It is an invariable rule that no man dismissed from one public dept. shall be admitted to another (*Hans. D.* v. 227, p. 560).

<sup>4</sup> Grey, *Parl. Govt.* p. 287; Mr. Gladstone, *Hans. D.* v. 205, p. 1324; and 3rd Rep. Com<sup>o</sup>. Civ. Serv. Expend. *Com. Pap.* 1873, v. 7, p. 649.

inevitably follow that the opposite party, on succeeding to power, would retaliate on those who had assisted to uphold a rival ministry; and thus a repetition of vindictive and extensive changes amongst government *employés* would occur, which would prevent the growth of experience in office, and destroy the efficiency of the public service.

All public *employés*, whatever may be their private convictions on political questions, are bound to discharge their duties towards their official superiors for the time being honestly and faithfully, affording to them all the assistance in their power. But this assistance is necessarily limited to the sphere of official obligation, and does not require the surrender of private opinions, or justify an intermeddling, on behalf of their employers, in political strife. While, on the one hand, the practice of depriving persons of subordinate offices simply on account of their political views is destructive of all efficient administration—as the example of the American Republic has strikingly shown—on the other hand, it is manifestly unreasonable that any public servant should be permitted to continue in active opposition to the existing government.<sup>1</sup>

Any connection of public officers with the press, which should lead to the improper use of official information, or which would disturb the confidential relations which ought to subsist between members of the civil service and their chiefs, is strictly prohibited.<sup>2</sup>

It is not easy to define the extent of "misconduct" which should properly subject a permanent officer of the crown to dismissal. During a period of great political excitement the government may be constrained to act with more severity towards public servants who may take an active part in politics, than at ordinary times.

It has been suggested that the relations between the subordinate class of public functionaries and the executive govern-

<sup>1</sup> Desp. of col. secretary to Lieut.-Gov. of N. Scotia in 1848 and 1860, in respect to control and dismissal of public officers, *Toronto Globe*, Sept. 22, 1860, Desp. to Gov. of Jamaica prohibiting public officers from writing offensive letters in the press, *Com. Pap.* 1860, v. 45, p. 363; *Hans. D.* v. 171, p. 722. Also correspondence between col. sec. and Gov. of New Brunswick respecting dismissals from office for political reasons, *New Bruns. Ass<sup>y</sup>. Jour.* 1862, pp. 192-196.

<sup>2</sup> *Hans. D.* v. 225, pp. 912, 915.

ment should be regulated by statute, so as to prevent abuse of power on the part of the responsible advisers of the crown towards their subordinates in office. But it has been well remarked by Lord Grey that "it would be impossible to limit the power of dismissal to cases in which misconduct could be proved before a court of law, without incurring the risk of having the executive government paralyzed by the passive resistance of persons holding these situations, and by the obstructions they would be able to throw in the way of ministers they wished to oppose. Law would be too clumsy an instrument for regulating the conduct of the ministers of the crown and the permanent civil servants of the state in their relations to each other. This is now far more effectually and far more safely accomplished by the power of public opinion. So great is the authority of public opinion, that no minister now ever thinks of dismissing a public servant from those offices which are regarded as permanent, unless for gross misconduct; but at the same time he has the power (and public opinion would support him in using it) of dismissing such a servant for misconduct which it might be impossible for any law to define beforehand, and of which there might be no legal evidence, though there was a moral certainty."<sup>1</sup> Lord Grey proceeds to point out that active opposition to their political chiefs for the time being, or attempts to embarrass them either by passive resistance or by putting difficulties in the way of their administration of office, are just those kinds of misconduct which would be most dangerous, and yet most difficult to suppress or prevent by legal enactment.<sup>2</sup> "The knowledge that there is no legal restriction on the power of dismissal to prevent a minister from dealing with such a case, as it would deserve, has probably been the principal reason why such cases do not arise; and, by preventing the possibility of a struggle between a government and its servants, has kept up the good feeling which has hitherto existed between them."<sup>3</sup>

<sup>1</sup> Grey, *Parl. Govt.* new ed. pp. 326, 327.

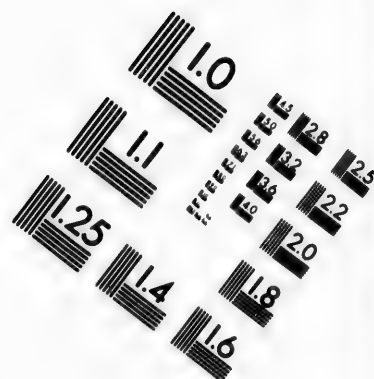
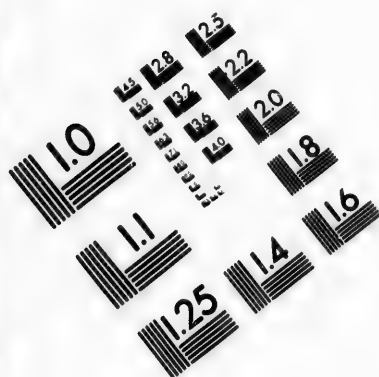
<sup>2</sup> *Ib.* p. 327. See speeches of Lord Granville and Grey, in House of Lords, April 18, 1864, on the Education Com. and the vote of the House of Commons.

<sup>3</sup> Grey, *Parl. Govt.* new ed. p. 327. See discussions in both Houses in 1872 as to alleged discourtesies in treatment of Dr. Hooker, direc. of

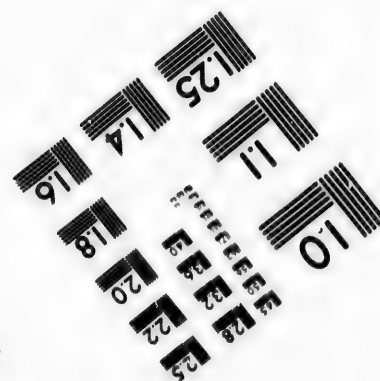
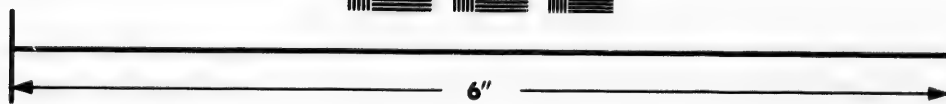
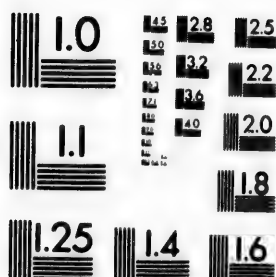
Exercise of the  
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Whenever it is deemed advisable, in furtherance of proposed reforms or retrenchments in the public service, to dispense with the services of any particular class of public *employés*, it has always been customary to respect the claims of existing incumbents, by allotting to them suitable pensions or retiring allowances. It was well said by Edmund Burke, whose patient labours in the cause of national retrenchment were so eminently successful, that it was neither wise, expedient, nor just to interfere retrospectively with places or pensions; that reform ought to be prospective; that the duration of the life of a nation was not to be compared with the short duration of the life of an individual; that an individual hardship, and especially an injustice, ought not to be committed for the sake of arriving a few years sooner at the object parliament had in view, namely, economical reform.<sup>1</sup> "The reason why public retrenchment in this country has been satisfactory to the nation is this, that no country, no parliament, in pursuing the work of retrenchment, ever has been so studiously observant of the claims of justice to every individual. And therefore the work of retrenchment must be a well-considered and a gradual work."<sup>2</sup> It is to the credit of the imperial government that they have invariably acted upon this magnanimous principle. Authority has been given to the Treasury, by a general Act of Parliament, to make suitable compensation to all persons whose offices may be abolished;<sup>3</sup> and in cases which do not come within the purview of this Act, special provision is made by parliament for the purpose.<sup>4</sup>

As with the appointment and dismissal, so also in regard to the remuneration of public *employés*, it should be left to the government to determine the amount of pay to be allotted to all public servants, of whatever grade or position.<sup>5</sup> Those who serve the

Kew Gardens, by his official chief, the first comm. of works, *Hans. D. v. 213*, pp. 2, 709.

<sup>1</sup> *Mir. Parl.* 1836, p. 1047.

<sup>2</sup> Mr. Gladstone's speech to electors of Greenwich, Dec. 21, 1868.

<sup>3</sup> 4 & 5 Will. IV. c. 24; *Com. Pap.* 1852-3, v. 57, p. 717.

<sup>4</sup> *Hans. D. v. 207*, p. 308. See case of Sir R. Bromley in 1865, wherein the govt. and the House of Commons dealt as liberally as possible with a valued public servant upon his retirement, *Hans. D. v. 180*, pp. 499-508.

<sup>5</sup> *Corresp. Will. IV. with Earl Grey*, v. 1, pp. 134-152; citing opinion of law officers of the crown.

crown should look directly to the crown for compensation and reward. The salaries and allowances of all public servants, in every department of state (with the exception of those functionaries whose salaries are fixed by Act of Parliament),<sup>1</sup> are regulated by the Lords Commissioners of the Treasury, and determined by Treasury minutes. It is competent for the official head of every public department to recommend to the Treasury the alteration or increase of salaries of his own subordinates. But every such recommendation is subjected to the closest scrutiny by the Treasury.<sup>2</sup> The salaries and expenses of the public departments are annually submitted to the review of the House of Commons in the estimates, and a separate vote is taken for the amount required to <sup>and voted by</sup> defray the same in each department. Appended to <sup>Parliament.</sup>

the estimate for every vote, a list is given of the different items of expenditure included therein; but, although it is within the power of the House of Commons, in committee of supply, to reduce any such vote by omitting the amount of any particular salary, or other item, this power is rarely exercised, and only upon grave and urgent considerations. It is perfectly competent for either House of Parliament, and more particularly for the House of Commons, to subject the conduct of the executive government towards the subordinate officers and servants of the crown to free inquiry and criticism; but there should be no attempt to interfere with the discretion of responsible ministers, in regulating the pay and allowances of public *employés*, except in cases where it is apparent that injustice and oppression have been exercised.

It is a rule in the public service that if an officer in the receipt of a pension receives new employment his pension is merged for the time being in the salary he receives.<sup>3</sup> When a man has been discharged from the public service <sup>Subject to</sup> upon retiring allowance and is afterwards found <sup>recall.</sup> capable of doing further work, the Treasury may recall him, and if he does not answer to the recall he forfeits his pension.<sup>4</sup>

<sup>1</sup> The officers of the two Houses of Parliament are also an exception to this rule (see *post*, pp. 182-186).

<sup>2</sup> *Hans. D. v.* 73, p. 1662; *Ib. v.* 117, p. 834.

<sup>3</sup> *Hans. D. v.* 233, p. 814.

<sup>4</sup> *Ib. v.* 235, p. 1420.

The system of superannuation allowances now existing in the civil service was first introduced early in the present century. Prior to that time provision for public officers on their retirement from active service was generally secured by methods which would now be considered as objectionable. The first Act for establishing a system of superannuations applicable to public officers generally was passed in 1810. In 1822, owing to the efforts of certain economical reformers, it was enacted that deductions should be made from the salaries of all civil servants as a contribution towards the superannuation fund. But this Act was repealed in 1824, and about £90,000 which had been collected under it repaid to the contributors, upon the principle that such deductions were in violation of the terms on which public officers had entered the service. In 1828 a finance committee of the House of Commons recommended the re-adoption of deductions, but parliament would not sanction this proposal, so far at least as existing interests were concerned. In 1829, however, a Treasury minute was passed—for the purpose of lessening prospectively the public charge for superannuations—by which deductions were imposed on the salaries of all civil servants to be thereafter appointed. This was ratified by parliament, and a new Act passed in 1834, authorizing deductions towards the superannuation fund to be made from the salaries of all civil servants, appointed after August 4, 1829, but exempting those who held office prior to that date from any such payment. The distinction thus made between two classes of civil servants, according as they received their first appointments before or after 1829, gave rise to much dissatisfaction. This, together with other anomalies and irregularities attending the working of the system, induced the government in 1856 to appoint a commission to inquire into the operation of the Superannuation Act. The commissioners made an elaborate report in the following year, wherein they reviewed the whole question in all its bearings. Admitting that their first impression in entering on the inquiry had been favourable to the retention of deductions, they concluded, upon a careful review of the whole case, and “with a view to public interests alone,” to recommend the total abolition of deductions for the purpose of superannuation, without any corresponding reduction in the

salaries on which such deductions had been charged," as being the only settlement of the question which was likely to be permanent and satisfactory."<sup>1</sup> This recommendation was approved by parliament, and an Act passed to repeal the section of the Act of 1834, under which the deductions had taken place (20 & 21 Vict. c. 37). In certain minor departments, such as the lighthouse boards, the endowed schools board, and some branches of the police service, the *employés* contribute to an annuity fund, which is supplemented by government.<sup>2</sup> But there has been a growing disposition of late years to grant superannuation allowances in all public establishments, without requiring any deductions from salaries.<sup>3</sup>

In 1859 another Act was passed to extend the operation of the Act of 1834 to all persons who had served in an established capacity in the permanent civil service of the state, and who were not otherwise provided for by parliament. The Act was necessary because several classes of public servants were omitted from the operation of the Act of 1834 in order to save them from becoming liable to the abatements, but, these deductions having been abolished, it was deemed expedient to bring all civil departments under the provisions of the Superannuation Act.<sup>4</sup> In 1869, by the Act 32 & 33 Vict. c. 32, the Treasury were empowered in their discretion<sup>5</sup> to commute pensions to retired officers in the army and navy and clerks in the war and admiralty departments by payment of a capital sum of money, according to the estimated duration of life of the pension holder.

On April 18, 1871, a motion was made (by a private member) to resolve—"That it is expedient to extend the provisions of the Pensions Commutation Act, 1869, to all departments of the civil service. In reply, the chancellor of the exchequer stated that ministers proposed to amend the said Act by taking away the privilege of commutation as far as regards pensions on retirement after sixty years of age, and upon a medical certificate, and by limiting the privilege to those who received compensatory pensions on account of the abolition or reorganization

<sup>1</sup> *Com. Pap.* 1857, Sess. 2, v. 24, pp. 217-237.

<sup>2</sup> Third Rep. Civ. Serv. Exp. *Com. Pap.* 1873, v. 7, p. 624.

<sup>3</sup> *Ib.* p. 637.

<sup>4</sup> *Hans. D.* v. 153, p. 354; 22 Vict. c. 26; 36 Vict. c. 23; and 39 & 40 Vict. c. 53.

<sup>5</sup> *Hans. D.* v. 211, p. 283.



of their office. With this restriction they proposed to extend the Act to the whole civil service. Satisfied with this concession, the member withdrew his motion.<sup>1</sup> [The Bill was accordingly introduced and passed.<sup>2</sup> It was extended to telegraph clerks by Act 35 & 36 Vict. c. 83, and amended by Act 39 & 40 Vict. c. 73, and again amended in 1882 so as to admit of the commutation of a portion of a pension.] But the Treasury would object to commute a pension for any one of whom there was a definite prospect of his being again employed in the public service.<sup>3</sup>

By the Superannuation Act of 1875, a special rate of pension is allowed to persons who have been in the civil service of the state in an "unhealthy place."

That all persons employed by the crown in the civil service of the United Kingdom are entitled to superannuation allowances after a certain length of service is a principle which, ratified by Act of Parliament, is now "universally admitted,"<sup>4</sup> provided only that they have reached the age when retirement upon a pension is allowable, or that an earlier retirement is justified by a medical certificate of incapacity for further service.<sup>5</sup> But if it should afterwards appear that a pension had been granted upon insufficient grounds, or at too high a rate, the lords of the Treasury would revise their decision and issue a new minute thereon.<sup>6</sup> All pensions and retiring allowances to public servants, although payable under statutable authority, are awarded by the lords of the Treasury, pursuant to regulations they are empowered to make from time to time for that purpose.

The maximum pension to a retiring civil servant contemplated by the Superannuation Act is an amount equal to two-thirds of his salary. But, by the 9th clause of the Act, pensions up to the full amount of the salary may be granted "in cases

<sup>1</sup> *Hans. D. v.* 211, p. 1253-1259.

<sup>2</sup> 34 & 35 Vict. c. 36.

<sup>3</sup> *Hans. D. v.* 208, p. 1847.

<sup>4</sup> *Ib. v.* 177, p. 1907; 57 Geo. III. c. 65; extended by 4 & 5 Will. IV. c. 24.

<sup>5</sup> *Hans. D. v.* 223, p. 1214. If the government should refuse to allow to a public officer his just claims under the Superannuation Act, he could apply to the Court of Queen's Bench for a mandamus to compel the treasurer to pay him whatever he was entitled to receive (*Hans. D. v.* 180, p. 503; New Zealand, *Leg. Coun. Jls.* 1874, App. 2).

<sup>6</sup> Case of Sir W. Brown, *Com. Pap.* 1871, v. 37, p. 327.

where the services were of a peculiar and unusual degree of merit."<sup>1</sup> But this power has been most sparingly exercised.<sup>2</sup>

Formerly pensions were granted at the discretion of the sovereign. But, as great irregularities prevailed in the granting of pensions by the crown, it became necessary for parliament to interpose its authority to regulate and restrict the exercise of this prerogative. Prior to the reign of Queen Anne, the crown had assumed the right of charging its hereditary revenues with pensions and annuities; and it had been held that the king had power in law to bind his successors. But, on the accession of Queen Anne, an Act was passed (1 Anne c. 7), forbidding the alienation of any portion of the hereditary revenues for any term beyond the life of the reigning monarch. On the accession of George III. the land and other revenues of the crown, except the revenues of the duchies of Cornwall and Lancaster, were surrendered to parliament, in exchange for a fixed civil list.

The pensions which had previously been paid out of these revenues were henceforth paid out of the civil list. There was no limit to the amount of pensions so long as the civil list could meet the demand; and no principle on which the grant of them was restrained, save the discretion of the crown and its advisers.<sup>3</sup>

The abuses of the pension list, and the enormous facilities it afforded for corrupt practices, frequently engaged the attention of parliament during the reign of George III., and several Acts were passed at different periods to regulate the grant of pensions. The constitutional right of parliament to investigate this matter, and to control the crown in respect to all payments of the civil list, was fully asserted and secured by Burke's Act in 1782:<sup>4</sup> this Act forbade the granting of secret pensions, upon the principle that parliament had a right to be informed of every instance of the exercise of this prerogative in order to ensure and enforce the

<sup>1</sup> *Hans. D. v.* 217, pp. 1531, 1561.

<sup>2</sup> Case of Sir R. Hill, *Com. Pap.* 1864, v. 30, p. 610; v. 32, pp. 565, 569; *Ib.* 1873, v. 7, pp. 556, 571; *Ib.* 1875, v. 42, p. 675; *Ib.* 1877, v. 49, p. 587, etc.

<sup>3</sup> May, *Const. Hist.* v. 1, pp. 214, 215.

<sup>4</sup> 22 Geo. III. c. 82; and see debate on Sir C. W. Dilke's motion in regard to Civil List in *Hans. D. v.* 210, pp. 251-317; Fitzmaurice, *Life of Lord Shelburne*, v. 3, pp. 4, 80.

responsibility of the ministers of the crown.<sup>1</sup> It further acknowledged the principle that pensions ought to be granted for two causes only ; namely, as a royal bounty to persons in distress, or as a reward for desert.

The interference of parliament to restrain abuses in the grant of pensions continued during the succeeding reigns of George IV. and William IV. ;<sup>2</sup> and finally, upon the accession of her present Majesty, an Act was passed which limited the right of the crown to grant new pensions on the civil list to the sum of £1200 in each year ; in addition to the pensions previously in force. A like amount is granted to her Majesty, for each and every successive year of her reign, cumulatively, for the bestowals of new pensions : such pensions, pursuant to a resolution of the House of Commons of February 18, 1834, to be awarded only to "such persons as have just claims on the royal beneficence, or who, by their personal services to the crown, by the performance of duties to the public, or by their useful discoveries in science and attainments in literature and the arts, have merited the gracious consideration of their sovereign and the gratitude of their country."<sup>3</sup> It is further required, that a list of the pensions granted shall be annually laid before parliament, so as to enable the House of Commons to give its advice in regard to their bestowal, should it desire to do so.<sup>4</sup> The first lord of the Treasury, and not the chancellor of the exchequer, is the responsible minister upon whose advice these pensions are conferred.<sup>5</sup>

It is now recognized as a constitutional rule that all pensions should be granted by parliament, or out of funds set apart by parliament for the purpose ; and that the grant of pensions should invariably come under the cognizance of the House of Commons.<sup>6</sup> Even in the case of pensions and retiring allowances

<sup>1</sup> Burke's Works, v. 3, pp. 304-307 ; and see *Hans. D.* v. 183, p. 423.

<sup>2</sup> May, *Const. Hist.* v. 1, pp. 217, 218 ; see *Hans. D.* v. 176, p. 358.

<sup>3</sup> 1 & 2 Vict. c. 2 ; Rep. of Com<sup>e</sup> on civil list pensions, *Com. Pap.* 1837-8, v. 23, pp. 55-59 ; *Ib.* 1868-9, v. 35, p. 1100

<sup>4</sup> *Com. Pap.* 1861, v. 34, p. 237.

<sup>5</sup> *Mir. of Parl.* 1840, pp. 1327, 1347. In proof of difficulty of obtaining one of these pensions, see Veitch's *Life of Sir Wm. Hamilton*, pp. 284, 294 ; *Quar. Rev.* v. 130, p. 407.

<sup>6</sup> *Com. Pap.* 1868-9, v. 35, pp. 1105-1109.

awarded, according to established practice, under the provisions of the Superannuation Acts, the money to defray the same must be annually voted by the House of Commons, although the faith of parliament might be virtually considered as pledged to their continuance;<sup>1</sup> and it is only in extreme cases of grave misconduct, that a public officer is deprived of his ordinary right to a pension.<sup>2</sup>

The authority that appoints to office is necessarily competent to dismiss any insufficient or untrustworthy servants. It is also the proper judge of their qualifications and of the remuneration they should receive. In all such matters parliament ought not to interfere except in cases of manifest abuse or corruption, when it may be called upon to exercise its inquisitorial power. Upon such occasions, however, the Houses of Parliament are constitutionally empowered to institute investigations, to declare their opinion as to the manner in which this prerogative has been exercised in any particular instance, and, if need be, either to appeal to the crown to redress the grievance, or to proceed to remedy it themselves by an act of legislation.

Right of parliament to investigate and to advise the crown, in respect to this prerogative.

It is also quite in accordance with constitutional usage for either House to address the crown or to record their opinion by resolution upon the existing state of the various public departments generally, and to advise the adoption of such reforms as may be calculated to increase the efficiency of administration.<sup>3</sup> But when fundamental changes are sought to be effected, whereby the crown would be deprived of any of its prerogative rights, or which transcend the scope of the lawful authority of an order in council, the proper course would be to bring in a Bill, embodying the substance of the proposed regulations, in order that the same may receive the concurrence of the whole legislature.<sup>4</sup> This was the plan pursued by Mr. Burke, in

<sup>1</sup> Att.-Gen. *Hans. D.* v. 179, p. 1320. In the annual estimates the sum required under Superann. Acts is included in one vote, but names, etc., of all pensioners are appended thereto, and a list of the new pensions given.

<sup>2</sup> *Hans. D.* v. 255, p. 197.

<sup>3</sup> See Debates in Parl. on Motions for Administrative Reform, *Hans. D.* v. 138, pp. 2040-2133, 2154-2225, 2332. Proposed resolutions in regard to constitution of the Office of Works, submitted to the House of Commons in 1860, 1863, and 1866.

<sup>4</sup> *Hans. D.* v. 139, pp. 695, 713.

1780, in carrying out his proposed economical reforms in the various departments of state.<sup>1</sup>

Another indirect but powerful influence possessed by parliament in the control of the public service arises from the necessity for obtaining the sanction of the legislature to the supplies required for carrying on the government and defraying the salaries of all the public *employés*. Thus without touching the prerogative itself its exercise is moderated. The effect of this check upon the exercise of the royal prerogative is that the responsible ministers of the crown usually take care not to advise the sovereign to do any act requiring to be supported by supplies, unless they believe that it will meet with the approbation of parliament, especially that of the lower House, which is invested by the constitution with the principal control over the public purse.

Moreover, by the usage of parliament, it has always been considered allowable for either House to address the crown for funds to defray the salaries and other expenses of their own establishments, pursuant to regulations they may themselves adopt in this behalf; and each House is at liberty to determine the amount of remuneration to be allowed to their respective officers and servants, subject to the approval of the House of Commons in committee of supply.<sup>2</sup> The salaries of the principal officers are fixed by statute, and are paid out of the consolidated fund. Proposals for the increase of other salaries, and generally in regard to contingent expenses, must be approved by the commissioners for regulating the offices of the House of Commons, or on their behalf by the Speaker. But all such proposed expenditure for either House must be included in the estimates, and annually voted in committee of supply. It is customary for the government, in their own discretion, to give effect to recommendations from committees of the House of Commons, in favour of appropriations for particular parliamentary services, by inserting items in the supply estimates, to the required amount,

<sup>1</sup> 22 Geo. III. c. 82. See other cases cited in Tomline's Law Dictionary, verbo *Office*, I.

<sup>2</sup> *Com. Jour.* June 29, 1836; *Lords Jour.* April 23, 1850; *Hans. D.* v. 218, p. 762.

without waiting for any formal application from the House itself.<sup>1</sup>

The salaries and retiring allowances of the House of Lords establishments are fixed by the House itself,<sup>2</sup> but annually voted in committee of supply. The estimate for the House of Lords is now prepared by a committee of the House and sent to the Treasury, by whom it is generally accepted without dispute.<sup>3</sup> The salaries and contingencies of the Lords are now included in the annual estimates and voted in supply. But the Lords are permitted to retain the right of paying for retired allowances of their officers out of the interest of the invested fee fund. The fee fund of the House used ordinarily to suffice to pay all these demands; but when a deficiency occurred application was made by the clerk of the parliament to the Treasury, to insert in the estimates a sufficient sum to cover the same. Formerly the Treasury had no knowledge or control over the fee fund of the House of Lords, or over the appropriation thereof. But in 1865 they suggested to the clerk of the parliament the expediency of following the course adopted by the House of Commons, in regard to their fee fund, which is regularly paid over to the consolidated fund, and the charges upon the same included in the annual estimates, and voted by parliament.

With the consent of the House of Lords, the salaries and expenses of the House of Lords' offices were, for the first time, included in the civil service estimates for the year ending March 31, 1870, and brought under the control of the House of Commons. But the Treasury do not exercise any control over this expenditure. A portion of the fee fund was retained by the Lords in 1869, the interest of which is used to defray the retired allowances in the Lords' offices; but over £30,000 is annually paid over to the Exchequer, as extra receipts. If this sum should prove insufficient, the balance is paid out of current fees.<sup>4</sup> Moreover, by the Act 29 & 30 Vict. c. 39,

<sup>1</sup> Estimates for Civ. Serv. 1862-3; *Com. Pap.* 1862, v. 35.

<sup>2</sup> See *Lords Jour.* Aug. 27, 1835; Aug. 28, 1846; April 23 and July 30, 1850; Aug. 12, 1859; June 5, 1862.

<sup>3</sup> *Hans. D.* v. 150, p. 1128; v. 202, p. 383.

<sup>4</sup> Report Com<sup>e</sup> Pub. Acc. p. 47, *Com. Pap.* 1865, v. 10; *Lords Pap.* 1867-8, v. 30, p. 881; *Civ. Serv. Est.* 1878-9; *Com. Pap.* 1878, v. 53.



§§ 33, 34, the Treasury is empowered to insist that the Lords' fee fund shall be audited; and they have pledged themselves to the House of Commons to use the powers so conferred upon them.<sup>1</sup>

Applications for pensions by officers of the House of Lords are decided upon by the House itself; either directly, or upon a report from the select committee on the office of the clerk of the parliament and usher of the Black Rod.<sup>2</sup>

The salaries, retiring allowances, and other disbursements on behalf of the establishments of the House of Commons have been heretofore regulated by reports of committees of the House, and are now settled by the commissioners appointed by statute<sup>3</sup> for regulating the offices of the House of Commons. The commissioners consist of the speaker of the House of Commons, the chancellor of the exchequer, the secretaries of state, and certain other functionaries, being members of the House of Commons. Practically, the actual business of the board is transacted by the Speaker. But the board is always convened when there is anything important to be done. The salaries of officers of the House of Commons have been fixed from time to time, pursuant to various reports from select committees of the House, from 1836 (up to which period they were paid by fees) to 1849. The establishment is divided into three branches or departments; which are under the Speaker, the clerk, and the serjeant-at-arms respectively. The head of each department is responsible for the items which concern his own department, whether they be for salaries or contingent expenses; and the entire pay-list is submitted to the Speaker, for his approval and signature. If the establishment requires to be varied, or increased, it is done by the permanent head of the department with the approval of the Speaker. The Treasury is not con-

See *Hans. D.* v. 177, p. 1123; *Ib.* v. 197, p. 1474; v. 202, p. 383; 3rd Rep. Civ. Ser. Exp. Com. Pap. 1873, v. 7; *Ev.* pp. 8, 34; *Civ. Serv. Est.* 1877-8, p. 61, n.; *Com. Pap.* 1877, v. 57.

<sup>1</sup> *Hans. D.* v. 187, p. 853.

<sup>2</sup> Mr. Birch's case, *Hans. D.* v. 97, p. 1; Mr. Edmunds' case, *Lords Jour.* v. 97, pp. 27, 28; and see Mr. Gladstone's observations, in *Hans. D.* v. 177, p. 1370. The resolution granting Mr. Edmunds a pension was afterwards rescinded, on proof that he had been guilty of gross misconduct and malversation in office (*Hans. D.* v. 179, pp. 6-45).

<sup>3</sup> 52 Geo. III. c. 11; and 9 & 10 Vict. c. 77.

sulted, "the Speaker's sanction would be sufficient: for instance, in 1865, there were two referees of private Bills put on, at £1000 each—that was done with the sanction of the Speaker." By the Act 12 & 13 Vict. c. 72, the Speaker's audit in regard to all expenditure for the House of Commons is final. His order is the warrant to the Treasury to insert the amounts required to be voted by parliament in the annual estimates. The Treasury adopt his return without examination, and include the amount in the estimates, because it concerns the internal economy of parliament.<sup>1</sup> There are, however, certain items of expenditure, which are common to both Houses, that are settled by the Treasury; such as the sums to be allowed for the payment of witnesses attending committees, the allowance for a shorthand writer, and other miscellaneous charges of inconsiderable amount.

Retiring allowances to officers of the House of Commons are settled by the commissioners on the basis of the Superannuation Acts.<sup>2</sup>

Upon the retirement of the Speaker of the House of Commons from the chair, it has been the invariable usage for the House to address the crown, that <sup>Speaker of House of Commons.</sup> "some signal mark of royal favour" may be conferred upon him, on his "ceasing to hold the office of Speaker." The response to this application on the part of the crown, is by conferring a peerage upon the retiring Speaker, and by a message recommending the House to grant a suitable allowance for the support of the dignity.

In 1817, on the retirement of Mr. Abbot from the speakership, the crown took the initiative in recommending provision for him, without waiting for an address from the House of Commons. This was resented as irregular and objectionable.<sup>3</sup>

A similar practice formerly prevailed in the case of the chaplain to the House of Commons. After a short <sup>Chaplain.</sup> term of service it was customary to vote an address to the crown, soliciting the bestowal of church preferment

<sup>1</sup> For comparative statement of salaries paid to principal officers of both Houses of Parliament in Great Britain, Canada, and the Australian Colonies, see *Jour. Leg. Coun. New Zealand*, 1877, Appx. No. 18.

<sup>2</sup> See Rep. Com<sup>o</sup> on Public Acc. Evid. 885, 977, etc., 1107, etc., 1121, etc., *Com. Pap.* 1865, v. 10; Rep. Com<sup>o</sup> Civ. Serv. Ex. *Com. Pap.* 1873, v. 7, Evid. p. 9; *Hans. D.* v. 177, p. 1123; *Ib.* v. 187, pp. 855, 1093; v. 197, p. 1478; v. 223, p. 1637.

<sup>3</sup> *Colchester Diary*, v. 3, p. 1

upon this functionary. When parliaments were of triennial duration, such addresses were uniformly passed after a service of about two years and a half. After they became septennial, it was usual to allow the Speaker two chaplains during each parliament. Since 1837, owing to diminution of church patronage in the gift of the crown, an annual salary has been voted to this officer in supply, in lieu of an application for preferment. But on May 31, 1838, the House having, prior to the change of system, addressed the crown in favour of three chaplains, and received favourable answers, though (for the reason above mentioned) no preferment had been conferred upon them, an address, recapitulating these circumstances, and reiterating the request, was agreed to. During the debate thereon, the home secretary (Lord John Russell), while defending the government from an intentional disregard of the wishes of the House, admitted that the House were justified in the course they had taken. But he afterwards observed "that no address of the House can bind the crown in the disposal of its patronage, otherwise than according to the advice that may be given to it."<sup>1</sup> In reply to the address, her Majesty stated that she would "take into her consideration in what manner the wishes of her faithful Commons could be carried into effect."<sup>2</sup> In the course of the session, in committee of supply, an opinion being generally expressed in favour of a salary of £400 a year being allowed to the chaplain instead of £200, as heretofore, the chancellor of the exchequer promised to consider the matter. Accordingly, the estimates of the following year proposed to fix the salary at £400, which has ever since been the recognized allowance of this dignitary; and from that time the situation has been held as a permanent appointment.<sup>3</sup>

The foregoing particulars will show that the Houses of Parliament are at liberty to determine the remuneration to be allowed to their own officials, subject to the approval of the Treasury and the consent of the House of Commons.<sup>4</sup>

<sup>1</sup> *Mir. of Parl.* 1838, p. 4401.

<sup>2</sup> *Ib.* p. 4541.

<sup>3</sup> *Ib.* p. 5323; *Ib.* 1839, p. 416; Parkinson's *Under Govt.* p. 54.

<sup>4</sup> But a motion to declare the opinion of the House as to the extent of remuneration that ought to be allowed by the lords of the Treasury to Mr. Gurney for expenses of experiments in lighting the House of Commons, performed under the direction of a committee of the House, was pronounced

But while, as a rule, any direct interference by parliament with the exercise of the prerogative of the crown, in the appointment, control, or dismissal of public servants, would be unconstitutional, unless in the peculiar circumstances already indicated, when it may become the duty of parliament to tender advice upon the subject; <sup>Inquiries of ministers.</sup> it is nevertheless agreeable to usage, and of great public advantage,<sup>1</sup> for inquiries of ministers or desultory discussions to take place, in either House, in reference to the appointment and control of office-holders, in particular instances, when a direct motion on the subject would be objectionable. In this way opportunity is afforded to the administration to explain and defend the propriety of appointments, which may have been subjected to misrepresentations by the press or the public at large.

We have now completed our review of the royal prerogative in relation to office-holders. We have seen that the constitution has vested in the sovereign the <sup>Summary.</sup> right of appointing, controlling, remunerating, and dismissing the public servants of the crown. By this means, the dignity and independence of the crown in the choice of its officers and the efficiency of the public service are secured. At the same time, adequate protection is afforded against abuse in the distribution of patronage and the control and dismissal of public *employés* by the responsibility of ministers to parliament for the faithful exercise of this prerogative. Ministers are directly accountable for maintaining the public service in a proper state of efficiency, for selecting qualified persons to fill all subordinate offices under the crown, for awarding to such persons adequate remuneration, and for granting them protection against oppression or dismissal upon insufficient or unwarrantable grounds.

by the Speaker to be informal, without the previous consent of the crown (*Mir. of Parl.* 1839, p. 5116).

<sup>1</sup> Mr. Gladstone, *Hans. D.* v. 195, p. 40.

## CHAPTER IV.

THE ROYAL PREROGATIVE—*continued.*THE CROWN AS THE FOUNTAIN OF JUSTICE, MERCY, AND  
HONOUR.1. *The Crown and the Judicature.*

THE administration of justice, freely and indifferently, to all people, of whatsoever degree, is of the highest importance to the well-being of a commonwealth.

By the constitution of this kingdom, the sovereign is regarded as the fountain of justice. "By the fountain of justice, the law does not mean the author or original, but only the distributor. Justice is not derived from the king, as from his free gift, but he is the steward of the public, to dispense it to whom it is due. He is not the spring, but the reservoir, from whence right and equity are conducted by a thousand channels to every individual." Though justice flows from the king as its fountain, he cannot administer it personally, or authorize any deviation from the laws.<sup>1</sup> He is debarred from adjudicating upon any matter except through the instrumentality of persons duly appointed to that end. The courts of law, originally created for the purpose of hearing and determining actions and suits, must proceed according as the law directs. And the crown cannot of itself establish any new court, or change the jurisdiction or procedure of an existing court, or alter the number of the judges, the mode of their appointment, or the tenure of their office. For all such purposes the co-operation of parliament is necessary.<sup>2</sup>

<sup>1</sup> Petersdorff, *New Abrdmt.* v. 6, p. 215.

<sup>2</sup> Hearn, *Govt. of Eng.* p. 74; Bowyer's *Const. Law*, pp. 170, 171, 496; Forsyth, *Const. Law*, p. 186.

It is an ancient right of the House of Lords to summon the judges of England, at the beginning of each parliament, to be present for the purpose of assisting the House with their advice, when required, upon legal questions. Though they continue to receive such summonses, it is now the practice that they do not attend, except at the opening of parliament, unless they are specially summoned, for a particular purpose. Such special summonses have been made, from time to time, up to the year 1880, when, in the case of *Angus v. Dalton*, the House of Lords summoned seven of the judges, to assist in deciding upon the case. The Irish and Scotch judges do not receive summonses; nevertheless on two or three occasions the Scotch judges have been required to appear and advise the House on Scottish legal questions.<sup>1</sup>

It is, moreover, one of the principal duties and functions of parliament "to be observant of the courts of justice, and to take due care that none of them, from the lowest to the highest, shall pursue new courses unknown to the laws and constitution of this kingdom, or to equity, sound legal policy, or substantial justice."<sup>2</sup>

Nevertheless, the integrity and independence of the judicial office are amply secured from encroachment either by the crown, the courts, or the legislature. From the reign of Edward III., any interference on the part of the crown with the due course of justice has been declared to be illegal;<sup>3</sup> it is a principle of law that no action will lie against a judge, either of a superior or of an inferior court, for a judicial act, even though it be alleged to have been done maliciously and corruptly;<sup>4</sup> and constitutional usage forbids either House of Parliament from entertaining any question which comes within the jurisdiction of a court of law to determine; or from instituting investigations into the conduct of the judiciary, except in extreme cases of gross misconduct or perversion of

<sup>1</sup> *L. T.*, Nov. 27, 1880, p. 58.

<sup>2</sup> Report on Lords' Proceed. on Mr. Hasting's trial, *Com. Jour.* v. 49, p. 517; Stubbs, *Const. Hist.* v. 2, p. 605.

<sup>3</sup> Hearn, p. 79. See arguments of Mr. Lowe and of Sir H. James in *Hans. D.* v. 235, pp. 421, 442.

<sup>4</sup> Broom, *Constitutional Law*, pp. 763-772; Thomas, *Const. Cases*, p. 81. Except for the refusal of the writ of *habeas corpus*, under the Act 31 Car. II. c. 2, sec. 9, or for the refusal of a Bill of Exceptions under Stat. Westminster 2, 13 Edw. I. c. 31.



the law, that may require the interposition of parliament in order to obtain the removal of a corrupt or incompetent judge.<sup>1</sup>

All judges are sworn well and truly to serve the queen and her people in their several offices, and to "do equal law and execution of right to all the queen's subjects, rich and poor, without having regard to any person."<sup>2</sup> But in the event of a judge, either wilfully or through ignorance, violating his oath, or otherwise misconducting himself in the judicial office, the constitution has provided an adequate remedy, and a method of depriving him of his judicial functions.

Previous to the revolution of 1688, the judges of the superior courts, as a general rule, hold their offices at the will and pleasure of the crown. Under this tenure there were frequent instances, from time to time, of venal, corrupt, or oppressive conduct on the part of judges, and of arbitrary conduct—in the displacement of upright judges, and conniving at the proceedings of dishonest judges—on the part of the crown, which gave rise to serious complaints, and led to several attempts, during the seventeenth century, to limit the discretion of the crown in regard to appointments to the bench.<sup>3</sup> At length, by the Act of Settlement, passed in the year 1700, it was provided that, after the accession of the house of Hanover to the throne of England, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawful to remove them."<sup>4</sup>

One step only remained to place the judges in a position of complete independence of the reigning sovereign, and that was to exempt them from the rule, ordinarily applicable to all office-holders, whereby their commissions should be vacated upon the demise of the crown. It is very doubtful whether this rule applied to the judges after they began to be appointed "during good behaviour,"<sup>5</sup> but it was

<sup>1</sup> See *post*, p. 192.

<sup>2</sup> Rep. of Oaths Commn. pp. 42-45, *Com. Pap.* 1867, v. 31.

<sup>3</sup> Hearn, pp. 80, 85; Atkinson, *Papinian*, p. 121.

<sup>4</sup> 12 & 13 Will. III. c. 2. See Pike, *Hist. of Crime in Eng.* v. 2, p. 322.

<sup>5</sup> Campbell, *Lives of the Chanc.* v. 5, p. 148.

deemed expedient to place the matter beyond dispute. Accordingly, one of the first public acts of George III., upon his accession to the throne, was to recommend to parliament the removal of this limitation. The suggestion was adopted by the passing of an Act which declared that the commissions of the judges shall remain in force, during their good behaviour, notwithstanding the demise of the crown: "Provided always that it may be lawful for his majesty, his heirs, etc., to remove any judge or judges upon the address of both Houses of Parliament." It was further provided that the amount of the judges' salaries now or hereafter to be allowed by any Act of Parliament should be made a permanent charge upon the civil list.<sup>1</sup> By various subsequent statutes, the judges' salaries are now made payable out of the consolidated fund,<sup>2</sup> which removes them still more effectually from the uncertainty attendant upon an annual vote in committee of supply.

Before entering upon an examination of the parliamentary method of procedure for the removal of a judge under the Act of Settlement, it will be necessary to inquire into the precise legal effect of their tenure of office "during good behaviour," and the remedy already existing, and which may be resorted to by the crown, in the event of misbehaviour on the part of those who hold office by their tenure.

Forfeiture of  
their offices for  
misbehaviour.

"The legal effect of the grant of an office during 'good behaviour' is the creation of an estate for life in the office."<sup>3</sup> Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour.<sup>4</sup> But "like any other conditional estate, it may be forfeited by a breach of the condition annexed to it; that is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity.<sup>5</sup> Misbehaviour includes, first, the improper exercise of judicial functions; second, wilful neglect

<sup>1</sup> 1 Geo. III. c. 23.

<sup>2</sup> *Com. Pap.* 1865, v. 30, p. 50.

<sup>3</sup> See opinion of colonial crown law officers in Return to an Order of the Leg. Assembly of Victoria (Australia) for correspondence respecting the Rights and Privileges of the Judges, *Votes and Proceedings Leg. Assy. Victoria*, 1864-5; C. No. 2, pp. 10, 11.

<sup>4</sup> See *Ld. Holt's judgment in Harcourt v. Fox*, 1 Shower, pp. 426, 506, 536; *Law Mag.* N.S. v. 20, p. 201.

<sup>5</sup> 4 Inst. 117.

of duty, or non-attendance ;<sup>1</sup> and, third, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise.<sup>2</sup> In the case of Misbehaviour in office. official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject, of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a jury.<sup>3</sup> When the office is granted for life, by letters patent, the forfeiture must be enforced by a *scire facias*.<sup>4</sup> These principles apply to all offices, whether judicial or ministerial, that are held during good behaviour."<sup>5</sup>

The legal accuracy of the foregoing definitions of the circumstances in which a patent office may be revoked is confirmed by an opinion of the English crown law officers (Sir William Atherton and Sir Roundell Palmer) communicated to the imperial government in 1862, wherein it is stated, in reference to the kind of misbehaviour by a judge that "would be a legal breach of the conditions on which the office is held," that, "when a public office is held during good behaviour, a power [of removal for misbehaviour] must exist somewhere ; and, when it is put in force, the tenure of the office is not thereby abridged, but it is forfeited and declared vacant for non-performance of the condition on which it was originally conferred."<sup>6</sup> To the same effect, Mr. (afterwards lord chief justice) Denman stated at the bar of the House of Commons, when appearing as counsel on behalf of Sir Jonah Barrington,<sup>7</sup> that independently of a parliamentary address or impeachment for the removal of a judge, there were two other courses open for such a purpose. These were (1) a writ of *scire facias* to repeal the patent by which the office had been conferred ; and (2) a criminal information [in the court of Methods of procedure against judges. king's bench] at the suit of the attorney-general. By the latter of these, especially, the case might speedily be

<sup>1</sup> 9 Reports, 50.

<sup>2</sup> *Rex v. Richardson*, 1 Burrow, 539.

<sup>3</sup> *Ib.*

<sup>4</sup> Com. Digest *Officer* (K. 11).

<sup>5</sup> 4 Inst. 117.

<sup>6</sup> Cited in *Votes and Proceedings, Leg. Assembly, Victoria*, 2nd Sess. 1866, v. 1, C. No. 8.

<sup>7</sup> See *Mir. of Parl.* 1830, p. 1702.

decided.”<sup>1</sup> On November 25, 1805, the Hon. Robert Johnson, one of the judges of the court of common pleas in Ireland, was convicted by the Court of King’s Bench, England, of a libel upon the lord-lieutenant of Ireland, and others.<sup>2</sup> After his conviction, the judge was permitted to effect a compromise, and resign his office.<sup>3</sup> The peculiar circumstances in which each of the courses above enumerated would be specially applicable have been thus explained: “First, in cases of misconduct not extending to a legal misdemeanour, the appropriate course appears to be by *scire facias* to repeal his patent, ‘good behaviour’ being the condition precedent of the judge’s tenure; second, when the conduct amounts to what a court might consider a misdemeanour, then by information; third, if it amounts to actual crime, then by impeachment; fourth, and in all cases,” at the discretion of parliament, “by the joint exercise of the inquisitorial and judicial jurisdiction” conferred upon both Houses by statute, when they proceed to consider of the expediency of addressing the crown for the removal of a judge.<sup>4</sup>

But, in addition to these methods of procedure, the constitution has appropriately conferred upon the two Houses of Parliament—in the exercise of that Action of parliament for removal of a judge. superintendence over the proceedings of the courts of justice which is one of their most important functions—a right to appeal to the crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of his judicial office. This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held. The liability to this kind of removal is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof.

In entering upon an investigation of this kind, parliament is limited by no restraints, except such as may be self-imposed.

<sup>1</sup> *Mir. of Parl.* 1830, p. 1897; *Foster on the Writ of Scire Facias*, book 3, ch. 2. For decision as to circumstances in which a writ of *scire facias* may be issued, see Moore, P.C. cases, N.S., v. 3, p. 439.

<sup>2</sup> Howell’s *State Trials*, v. 29, pp. 81–502; and see *Parl. D.* v. 5, pp. 557, 622.

<sup>3</sup> *Mir. of Parl.* 1830, p. 8197.

<sup>4</sup> *Lords Jour.* v. 62, p. 602.

Nevertheless, since statutory powers have been conferred upon parliament which define and regulate the proceedings against offending judges, the importance to the interests of the commonwealth, of preserving the independence of the judges, should forbid either House from entertaining an application against a judge unless such grave misconduct were imputed to him as would warrant, or rather compel, the concurrence of both Houses in an address to the crown for his removal from the bench.<sup>1</sup> "Anything short of this might properly be left to public opinion, which holds a salutary check over judicial conduct, and over the conduct of public functionaries of all kinds, which it might not be convenient to make the subject of parliamentary inquiry."<sup>2</sup>

Bearing this in mind, the House of Commons, to whom it peculiarly belongs to take the initiative in such matters, should remember the words once addressed to them by Edmund Burke: "We may, when we see the cause of complaint, administer a remedy; it is in our choice by an address to remove an improper judge; by impeachment<sup>3</sup> before the peers to pursue to destruction a corrupt judge; or, by Bill, to assert, to explain, to enforce, or to reform the law, just as the occasion and necessity of the case shall guide us. We stand in a situation very honourable to ourselves and very useful to our country, if we do not abuse or abandon the trust that is placed in us."<sup>4</sup>

Parliament "has not only the right to address the crown for the removal of a particular judge, but, in cases of misconduct, it has the right of exercising a superintending control over the manner in which the judges discharge their duties, and to institute inquiries relative thereto."<sup>5</sup> "The judges of the land act under responsibility;

<sup>1</sup> Fitzmaurice, *Life of Ld. Shelburne*, v. 2, p. 219.

<sup>2</sup> Att.-Gen. Pollock, *Hans. D.* v. 66, p. 1090.

<sup>3</sup> As in the case of Bacon, in 1620 (2 St. Trials, 1087), and Ld. Chanc. Macclesfield, in 1725 (16 St. Trials, 767). The procedure upon an impeachment by the House of Commons is described in detail in the 23rd chapter of Sir Erskine May's treatise on the *Usages of Parliament*.

<sup>4</sup> *Burke's Speeches*, v. 1, p. 80.

<sup>5</sup> *Hans. D.* v. 67, p. 1006. See discussions in Parliament in regard to the fitness of Ch. Just. Lefroy to continue to preside over Court of Q. B. in Ireland, when over ninety years of age (*Ib.* v. 182, p. 1629; v. 183, pp. 353, 778). His lordship resigned his seat on the bench very soon

and any misconduct of which they may be guilty may be inquired into, and animadverted upon, by either House of Parliament." Such inquiries ordinarily begin, by questions addressed in either House to members of the administration, for information in regard to the matter of complaint.<sup>1</sup>

But, in the discharge of these high inquisitorial functions, parliament has prescribed for itself certain constitutional rules and limitations, to prevent undue encroachment upon the independence of the judicial office, which is in itself one of the main bulwarks of English liberty. And it devolves upon the advisers of the crown, as those who are peculiarly responsible for preserving the purity of justice inviolate, to be foremost in vindicating the independence of the judges by whomsoever it may be assailed, and in guarding against the intrusion of party influences in any proceedings of parliament in matters affecting the administration of the law.<sup>2</sup>

Limits of  
parliamentary  
interposition.

Upon this principle, it is inexpedient for ministers to sanction the reception by parliament of motions or petitions complaining of the judges, unless in circumstances which would justify inquiry into the matter of complaint, and where there is a *bonâ fide* intention of proceeding thereon.<sup>3</sup> And it is the invariable practice of parliament never to entertain criminative charges against any one, except upon the ground of some distinct and definite basis. The charges preferred should be submitted to the consideration of

Criminative  
charges in  
parliament.

afterwards (*Ib.* v. 184, p. 835). [In a recent case the attention of the House of Commons was directed to alleged incapacity in a judge. But the House refused to interfere, and the judge shortly afterwards retired.—*Editor.*]

<sup>1</sup> *Ld. Chan. Campbell, Hans. D.* v. 163, p. 824; *Amos, Fifty Years Eng. Const.* p. 443. See discussions in House of Commons on certain expressions used in public by Irish judges (*Mir. Parl.* 1833, pp. 3925-3927; and *Hans. D.* v. 178, p. 196; *Ib.* v. 227, p. 1871). Inquiry respecting the language and demeanour of a vice-chan. in open court (*Hans. D.* v. 172, p. 871). Inquiry respecting the undue severity of certain sentences passed by the Dy. Asst. Judge of the Middlesex Sessions (*Ib.* v. 175, p. 1061). Inquiry respecting the great inequality of sentences frequently passed at assizes on criminals (*Ib.* v. 198, pp. 1373, 1530). Debate upon an alleged improper exercise of the power of judges to punish for contempt of court (*Ib.* v. 224, p. 1743; *Ib.* v. 226, p. 375).

<sup>2</sup> *Hans. D.* v. 215, p. 1297; *L. T.* v. 53, p. 58.

<sup>3</sup> *Disraeli, Hans. D.* v. 223, p. 463; *Atty.-Gen. Baggallay, Ib.* v. 225, p. 90.



the House in writing, whether it be intended to proceed by impeachment, by address for removal from office, or by committee to inquire into the alleged misconduct, in order to afford full and sufficient opportunity for the person complained of to meet the accusations against him.<sup>1</sup>

Complaints to parliament in respect to the conduct of the judiciary, or the decisions of courts of justice, should not be lightly entertained. Nothing could be more injurious to the administration of justice, than that the House of Commons should take upon itself the duties of a court of review of the proceedings of an ordinary court of law; or of the decisions of a competent legal tribunal; or, that it should "tamper with the question whether the judges are on this or that particular assailable," and endeavour "to inflict upon them a minor punishment"<sup>2</sup> by subjecting their official conduct to hostile criticism. Parliament should abstain from all interference with the judiciary, except in cases "of such gross perversion of the law, either by intention, corruption, or incapacity, as make it necessary for the House to exercise the power vested in it of advising the crown for the removal of the judge."<sup>3</sup>

While the consent of both Houses of Parliament is necessary to an address to the crown, upon which the sovereign shall be empowered to remove a judge holding office during "good behaviour," and while it is equally competent to either House in its discretion to receive petitions complaining of the administration of justice, or of the conduct of persons holding judicial office, or even to institute preliminary inquiries, by a select committee, into such complaints; a joint address under the statute ought properly to originate in the House of Commons, as being peculiarly the impeaching body, and pre-eminently "the grand inquest of the high court of parliament."

<sup>1</sup> Case of the Bishop of Bath and Wells, 1852 (*Hans. D.* v. 122, pp. 465, 613, 948-953). Case of Ch. Just. Monahan (*Hans. D.* v. 163, pp. 823, 898, 984; and again, *Ib.* v. 178, p. 196). See Mr. Wynn's observations in *Parl. D.* N.S. v. 13, p. 1249; Rpt. Sel. Comm. on Corrupt Practices; *Com. Pap.* 1870, v. 6, p. 17.

<sup>2</sup> Mr. Gladstone, *Hans. D.* v. 209, p. 757; *Ib.* v. 224, p. 585; v. 226, p. 561; v. 228, p. 965; v. 234, p. 1558.

<sup>3</sup> Ld. Palmerston, *Hans. D.* v. 140, p. 1561; Sir R. Peel's speeches in the case of Baron Smith, *Mir. of Parl.* 1834, pp. 132, 312; and debate on Dr. Kenealy's motion in regard to trial of Queen v. Castro.

The action of parliament for the removal of a judge may originate in various ways. It may be invoked upon articles of charge presented to the House of Commons by a member in his place, recapitulating the cases of misconduct of which the judge complained of has been guilty;<sup>1</sup> or, after a preliminary inquiry—by a royal commission (at the instance of government,<sup>2</sup> or at the request of either House of Parliament),<sup>3</sup> or by a select committee of the House—into the judicial conduct of the individual in question;<sup>4</sup> or, upon a petition presented to the House from some person or persons who may have a cause of complaint against a judge.<sup>5</sup> But no petition impugning the conduct of a judge should be permitted to remain upon the table of the House, unless, within a reasonable period, some member undertakes to invite the House to proceed upon the charges contained therein.

Bearing in mind the general responsibility of ministers of the crown for the due administration of justice throughout the kingdom, and the obligation which they owe to the dispensers of justice to preserve them from injurious attack or calumnious accusations, it is necessary that, before consenting to any motion for a parliamentary inquiry into the conduct of a judge—or even to the reception of a petition complaining of the conduct of a judge and not asking for his removal from office in accordance with the statute—or not alleging reasonable grounds for such a proceeding—ministers should themselves have investigated the matter of complaint, and be prepared either to oppose or facilitate the interference of parliament on the particular occasion.<sup>6</sup>

The House of Commons should not initiate, and ministers of the crown ought not to sanction, any attempt to institute criminative charges against any one, unless upon some distinct and definite basis; and, in the case of a judge, such charges should only be entertained upon allegations of misconduct that would be sufficient, if proved, to justify his removal from the bench.<sup>7</sup> But it is immaterial whether such misconduct

<sup>1</sup> Baron M'Clelland's case, *Parl. Deb.* v. 11, pp. 850-854.

<sup>2</sup> Chief Baron O'Grady's case, *Com. Jour.* v. 76, p. 432.

<sup>3</sup> Sir Jonah Barrington's case, *Mir. of Parl.* 1828, p. 1577.

<sup>4</sup> Judge Fox's case, *Lords Jour.* v. 45, p. 21.

<sup>5</sup> *Parl. Deb.* v. 3, pp. 22, 46.

<sup>6</sup> Judge Nicholl's case, *Mir. of Parl.* 1828, p. 2584.

<sup>7</sup> See observations in House of Commons in relation to a decision of Ch. Justice Coleridge, *Hans. D.* v. 232, pp. 1363, 1858.

had been the result of an improper exercise of his judicial functions, or whether it was solely attributable to him in his private capacity, provided only that it had been of a nature to unfit him for the honourable discharge of the judicial office.

No address for the removal of a judge ought to be adopted by either House of Parliament, except after the fullest and fairest inquiry into the matter of complaint, by the whole House, or a committee of the whole House, at the bar; notwithstanding that the same may have already undergone a thorough investigation before other tribunals.

The application of this principle will obviously necessitate that the person complained of shall be duly informed of the intended proceedings against him at every stage of the inquiry; that copies of all petitions, articles of complaint, and orders of the House in relation thereto, shall be promptly communicated to him; and that, upon his applying to the House for such permission, leave should be given him to appear by himself or counsel in his own defence.

In requesting the crown, by an address under the statute, to remove a judge who, in the opinion of the two Houses of Parliament, is unfit to continue to discharge judicial functions, the acts of misconduct which have occasioned the adoption of such an address ought to be recapitulated, in order to enable the sovereign to exercise a constitutional discretion in acting upon the advice of parliament.

But it is not merely judges of the superior courts who are amenable to the jurisdiction of parliament, and liable to removal upon an address of both Houses. The statute is equally applicable to the case of "any judge," holding office under the tenure of "good behaviour." It is true that the judges of the inferior courts are under the general supervision of the Queen's Bench, where they may be proceeded against by a criminal information for corruption or gross misconduct, and they are removable for misbehaviour, either at common law or by statute. The lord chancellor, moreover, has jurisdiction over magistrates, coroners and county court judges, and, if he shall see fit, "may remove for inability or misbehaviour" any of these functionaries.<sup>1</sup> But, independently of the power of supervision

Judges of  
inferior  
courts, how  
removable.

<sup>1</sup> *Hans. D. v. 222*, p. 1052; *Broom, Constitutional Law*, p. 790; *Stats. 9 & 10 Vict. c. 95*, sec. 18; *23 & 24 Vict. c. 116*, sec. 6.

and control over judges of inferior jurisdiction, which is thus conferred upon the higher legal tribunals, it is in the discretion of parliament to institute inquiries into the conduct of any person holding a judicial office, and if necessary to address the crown for his removal.<sup>1</sup>

So long as judges of the supreme courts of law in the British colonies were appointed directly by the crown, or under the authority of imperial statutes, it was customary for them to receive their appointments during pleasure.<sup>2</sup>

Nevertheless, the great constitutional principle, embodied in the Act of Settlement, that judicial office should be holden upon a permanent tenure, has been practically extended to all colonial judges; so far at least as to entitle them to claim protection against arbitrary or unjustifiable deprivation of office, and to forbid their removal for any cause of complaint except after a fair and impartial investigation on the part of the crown.<sup>3</sup>

In 1782 an imperial statute was passed which contains the following provisions: That if any person, holding an office granted or grantable by patent from the crown, shall be wilfully absent from the colony wherein the

<sup>1</sup> See case of the Salisbury magistrates, *Hans. D.* v. 196, p. 1608; case of Mr. Cook, county judge for Norfolk, *Ib.* v. 199, p. 1364; v. 200, p. 1174; illegal committal of Mr. Smallbones, by the county judge of Farnham, *Ib.* v. 225, p. 1816; v. 226, pp. 55, 291; case of Mr. Anketell, *Ib.* v. 235, pp. 92, 1046.

<sup>2</sup> Thus, by the Act 4 Geo. IV. c. 96, which was re-enacted by the 9 Geo. IV. c. 83, the judges of the supreme courts in New South Wales and Van Diemen's Land were removable at the will of the crown. But these statutes were repealed by imperial enactments, which provided new constitutions for the Australian colonies (5 & 6 Vict. c. 76; 18 & 19 Vict. cc. 54 and 55). And by the Act 6 & 7 Will. IV. c. 17, sec. 5, the judges of supreme courts of judicature in the West Indies were appointed to hold office during the pleasure of the crown. But this Act was constructively repealed by the Act 28 & 29 Vict. c. 63, sec. 5, which empowered all colonial legislatures to establish courts of judicature and to provide for the constitution of the same; and it was formally repealed by the Statute Law Revision Act of 1874. A similar tenure, however, still prevails in respect to judges in the East Indies and in crown colonies, and generally in all colonies not possessing responsible government (Papers respecting colonial judges, *Com. Pap.* 1870, v. 49, p. 435; also given in 12 Moore, *Indian App. cases*, Appx.; Act 24 & 25 Vict. c. 104).

<sup>3</sup> *Law. Mag.* N.S. v. 20, pp. 199-205; Rep. of Com<sup>o</sup>. of Society for Promoting Amendment of the Law in 1847 on Colonial Judgeships.

same ought to be exercised, without a reasonable cause to be allowed by the governor and council of the colony, "or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such governor and council to amove such person" from the said office: but any person who shall think himself aggrieved by such a decision may appeal to his Majesty in council.<sup>1</sup>

This law is still in force;<sup>2</sup> and, although it does not professedly refer to colonial judges, it has been repeatedly decided by the Judicial Committee of the Privy Council to extend to such functionaries. Adverting to this statute, in 1858, in the case of *Robertson v. The Governor-General of New South Wales*, the Judicial Committee determined that it "applies only to offices held by patent, and to offices held for life or for a certain term," and that an office held merely *durante bene placito* could not be considered as coming within the terms of the Act.<sup>3</sup>

From these decisions two conclusions may be drawn: first, that no colonial judges can be regarded as holding their offices "merely" at the pleasure of the crown; and, second, that, be the nature of their tenure what it may, the statute of the 22 Geo. III. c. 75 confers upon the crown a power of removal similar to that which corporations possess over their officers, or to the proceedings in England before the Court of Queen's Bench, or the lord chancellor, for the removal of judges of the inferior courts for misconduct in office. Under this statute, all colonial judges appointed *by patent* under the royal sign manual (which is the usual, if not universal, mode of appointment) are removable at the discretion of the crown, to be exercised by the governor and council of the particular colony, for any cause whatsoever that may be deemed sufficient to disqualify for the proper discharge of judicial functions, subject, however, to an appeal

<sup>1</sup> Act 22 Geo. III. c. 75, secs. 2, 3. This Act was confirmed and amended by the Act 54 Geo. III. c. 61, which regulates the method of procedure by patent officers in any colony who may desire to obtain temporary leave of absence; and declares that any public officer who shall not comply with such provisions shall be deemed to have vacated his office.

<sup>2</sup> *Hans. D. v.* 187, p. 1495. The first section of this Act, which relates to patent officers fulfilling the duties of their offices in person, was repealed by the Statute Law Revision Act, 1871.

<sup>3</sup> 11 Moore, *P. C.* p. 295.

to the queen in council.<sup>1</sup> But before any steps are taken to remove a judge from his office by virtue of this Act, he must be allowed an opportunity of being heard in his own defence.<sup>2</sup>

But it is not only upon an appeal from the decision of a colonial governor and council for the removal of a judge under the statute 22 Geo. III. that the Privy Council has jurisdiction in such matters of complaint. It is competent for the crown, acting through a secretary of state, and under the provisions of the Act 3 & 4 Will. IV. c. 41, sec. 4, to refer to the consideration of the Judicial Committee a memorial from a legislative body, in any of the colonies, complaining of the judicial conduct of a judge therein.<sup>3</sup>

Original jurisdiction of Privy Council over Judges.

It is likewise competent to either House of the imperial parliament to entertain questions in relation to the appointment or conduct of colonial judges.<sup>4</sup> Upon several occasions, a direct appeal has been made to the imperial parliament by, or on behalf of, judges who have been removed from office by the local authorities in various colonies or dependencies of the realm.<sup>5</sup>

Jurisdiction of parliament.

Since the introduction into the constitution of various British colonies of the principle of "responsible government," under which their political system has been assimilated as far as possible to that of the mother country, a provision similar to that contained in the Act of Settlement, authorizing the judges of the superior courts of law and equity to be appointed during "good behaviour," subject to removal upon an address from both

Colonial judges removable on a parliamentary address.

<sup>1</sup> Memo. by Sir F. Rogers, *Com. Pap.* 1870, v. 49, p. 440. For precedents of proceedings under this statute, for removal of a judge, see case of Judge Montagu, of Van Diemen's Land, in 1848 (*Com. Pap.* 1847-8, v. 43, p. 577); of Ch. Justice Pedder, of Van Diemen's Land, in 1848, which resulted in his unanimous acquittal (*ib.* pp. 624-646); of Judge Boothby, of S. Australia, in 1867 (*S. Aust. Parl. Pap.* 1867, v. 2, Nos. 22, 23); and see *Up. Can. Q. B. Rep.* v. 46, p. 483.

<sup>2</sup> Lord Chanc. Westbury, *Hans. D.* v. 164, p. 1063.

<sup>3</sup> See Sir F. Roger's Memo. on the removal of colonial judges, *Com. Pap.* 1870, v. 49, p. 440, and in 6 Moore, *P. C. N.S. App.* pp. 9-20.

<sup>4</sup> Case of Mr. Huggins, asst. judge in Sierra Leone, *Hans. D.* v. 198, p. 1214.

<sup>5</sup> *Com. Pap.* 1863, v. 38, p. 141; *Hans. D.* v. 170, p. 284; *ib.* v. 94, pp. 278-305; and v. 183, pp. 1290-1308.



Houses of Parliament, has been established by legislative enactment in the particular colonies.

The constitutional acts of the several Australian colonies, for example, contain clauses that the judges of the superior courts therein shall be appointed by the crown during "good behaviour;" but, nevertheless, it shall be lawful for her Majesty to remove any such judge upon the address of both Houses of the colonial parliament.<sup>1</sup> In Canada, up to the time of confederation, the law was substantially the same, except that "the governor" was empowered to remove a judge upon the address of both Houses of the Canadian Parliament; [and in case any judge so removed considered himself aggrieved thereby, he might, within six months, appeal to her Majesty in her Privy Council, and his removal is not final until determined by that authority.]<sup>2</sup>

Notwithstanding the facilities afforded for the removal of a judge for misconduct, under the constitutional Acts, the imperial statute 22 Geo. III. may still be invoked by the governor and council of any British colony, for the removal of a judge for any reasonable cause. But in a colony where procedure by parliamentary address against an offending judge has been established, recourse to the statute of George III. should only be had upon complaint of "legal and official misbehaviour."<sup>3</sup>

We may, therefore, infer that, where the remedy by parliamentary address is open, a judge should only be proceeded against under the statute 22 Geo. III., in a case analogous to

<sup>1</sup> South Australia Local Act, 1855-6, No. 2, secs. 30, 31, passed under authority of imp. statute 13 & 14 Vict. c. 59. New South Wales: see imp. Act. 18 & 19 Vict. c. 54, secs. 38, 39. Victoria: see imp. Act, 18 & 19 Vict. c. 55, sec. 38.

<sup>2</sup> Upper Canada Consol. Statutes, cap. 10, secs. 11, 12; Lower Canada Consol. Stats. cap. 81, sec. 1. By the imp. Act 30 Vict. c. 3, sec. 99, it is provided, that "the judges of the superior courts," throughout the whole dominion of Canada, "shall hold office during good behaviour, but shall be removable by the governor-general on address of the Senate and House of Commons."

<sup>3</sup> See correspondence between ch. justice and governor of N. S. Wales, in 1875, which was brought under notice of Earl Carnarvon (col. sec.) by the governor, which elicited an expression of regret on the part of the col. secretary, while the independent position of the chief justice precluded further proceedings against him (N. S. Wales, *Votes and Proc.* 1875-6, v. 2, p. 79).

that which, in England, would warrant the issue of a writ of *scire facias* to repeal the patent of a judge for misdemeanour in office.<sup>1</sup> If so, the institution of proceedings by a governor and council, under the statute, against a delinquent judge, may be looked upon as a substitute for the more formal and less available method of applying for the repeal of a patent granted during "good behaviour," upon an alleged breach of the condition thereof.

All judges holding office "during pleasure" are subject to removal by the governor of the colony, after taking the advice of his council, under the authority of the imperial Act 22 Geo. III. And judges appointed, during pleasure, may be suspended under the authority of the queen's commission and instructions, which authorize the governor to suspend any officer who is liable to dismissal by the crown. This suspension becomes dismissal if confirmed by the queen, who would in general act on the advice of the secretary of state, but in the case of a judge would most probably invoke the aid of the Judicial Committee of the Privy Council. Secretaries of state have inclined to prefer proceedings by "a motion" under Burke's Act, with appeal to the Judicial Committee, rather than suspension under the royal instructions, with appeal to themselves. In certain circumstances, immediate suspension is clearly advisable. But a governor who resorts to such a measure does so at his own peril, and is bound to make a complete case in justification of it.<sup>2</sup>

## 2. *The Prerogative of Mercy.*

All criminal offences are either against the queen's peace or against her crown and dignity. She is, therefore, the proper person to prosecute for all public offences and breaches of the peace. Hence her prerogative of pardon, whereby she is empowered to remit or mitigate the sentence against a criminal or criminals who have been guilty of treason or other felonies; for it is reasonable that that person only who is injured should have the power of forgiving. But this, like every other prerogative of the British crown, is held in trust for the welfare of the people, and is exercised only upon the advice of respon-

<sup>1</sup> See *ante*, p. 192.

<sup>2</sup> See Lords Grey and Granville in *Hans. D.* v. 201, pp. 1042-1047.

sible ministers.<sup>1</sup> It is, moreover, subject to the control of parliament, which has more than once interfered by statute to limit and restrain the effects of a royal pardon.<sup>2</sup>

Inasmuch as the corruption of blood, and the consequent disability of the heirs of an attainted person to inherit property, which results from an attainder, can only be removed by parliament, it has been sometimes necessary for the sovereign to invoke the assistance of parliament to give effect to the royal clemency towards political offenders, or their descendants; or to sanction the introduction of particular Bills into either House for that purpose.<sup>3</sup> But a general act of grace and pardon for political offences originates with the sovereign, by whom it is first transmitted to the House of Lords. It is received with peculiar marks of respect by the Houses of Parliament. It is only read once by each House, and cannot be amended, but must be either rejected or accepted altogether.<sup>4</sup>

A Bill of indemnity, or of general pardon and oblivion for political offences, may by invitation of the crown be initiated in either House of Parliament, proceeded upon as an ordinary Bill, and afterwards submitted for the royal sanction.<sup>5</sup>

The exercise of the prerogative of pardon is strictly confined to criminal offences, wherein the crown is a prosecutor, and does not extend to cases of private wrong.<sup>6</sup> Hence parliament has no right to address the crown for the release of a prisoner confined in gaol on a civil suit, or for non-payment of damages, or for contempt of court, as it is beyond the power of the crown to discharge such persons. Any such application by parliament would be invoking the exercise of an unconstitutional and arbitrary power, in violation of law and order.<sup>7</sup> Undue severity in such

Is confined to  
criminal  
offences.

<sup>1</sup> Martin, *Life P. Consort*, v. 1, p. 141.

<sup>2</sup> Petersdorff, *Abridgmt.* ed. 1864, v. 6, p. 43; Macknight's *Life of Lord Bolingbroke*, pp. 517, 558.

<sup>3</sup> *Com. Jour.* v. 23, p. 56.

<sup>4</sup> *Ib.* June 17, 1747. See Canada Stat. 12 Vict. c. 13.

<sup>5</sup> Macaulay, *Hist. of Eng.* v. 2, pp. 398, 575; *Parl. Deb.* v. 40, pp. 1423, 1536; *Ib.* N.S. v. 11, pp. 815, 1318.

<sup>6</sup> Bowyer, *Const. Law*, p. 172; Cox, *Inst.* 615, n.

<sup>7</sup> Case of J. Thorogood, *Mir. Parl.* 1840, pp. 4898, 4901, 4935, 5008; Broom, *Leg. Max.* 4th ed. p. 65; *Hans. D.* v. 189, p. 1560; v. 194, p. 768; v. 223, p. 102.

cases, if not capable of being redressed by the ordinary legal tribunals, can only be remedied by a special Act of Parliament.<sup>1</sup>

Formerly all royal pardons were granted under the great seal, upon the advice of the Privy Council. In compliance, generally, with the recommendation of the judge who presided at the trial, the Privy Council assembled to deliberate upon the case. Occasionally discussions arose on the question whether the crown should be advised to remit the sentence or not, in which the king himself took part. But, since the commencement of the present reign, this practice has fallen into desuetude, and the administration of the prerogative of mercy has devolved upon the secretary of state for the Home Department.<sup>2</sup> Thus the Home Office has gradually developed into a court of review in criminal cases, whenever a formal application is made for the remission of a sentence. But the office acts rather as a court of mercy than as a court of appeal, because the cases wherein the secretary of state sits as a court of review to re-try the prisoner, and to set aside verdicts, are exceedingly rare. For the most part the facts of the trial are not re-opened, there being seldom any doubt of the correctness of the verdict. The question generally is, whether it is a fit case for the interposition of the prerogative of mercy as a matter of grace. This is a question that no mere legal tribunal could decide, and it is one that suitably belongs to the crown, acting upon the advice of a responsible minister, to determine.<sup>3</sup>

<sup>1</sup> May, *Const. Hist.* v. 2, pp. 275-278. As to the right of the crown to remit penalties and forfeitures imposed by law, and recoverable by parties other than the crown, *i.e.* in suits by action of debt, as well as in criminal proceedings, see *L. T.* v. 59, p. 94; *Hans. D.* v. 224, p. 1131; v. 226, pp. 598, 691; 22 Vict. c. 32; 38 & 39 Vict. c. 80; and Art Unions Acts, 9 & 10 Vict. c. 48. In Canada the Gov.-Gen. can exercise this prerogative, pursuant to the terms of his commission (*Can. Sess. Pap.* 1869, No. 16).

<sup>2</sup> *Hans. D.* v. 174, p. 1483; *Ib.* v. 175, p. 252; Mr. Gladstone's letter to T. Sexton, M.P., of Sept. 6, 1882. See an article in the *West. Rev.* v. 25, p. 398, on the Prerogative of Pardon; see a disquisition on Executive Pardons in Rept. of Massachusetts Board of State Charities, Jan. 1871, pp. 46-79; Stephen, *Hist. Crim. Law of Eng.* 1883, v. 1, c. 10.

<sup>3</sup> Evid. of Sir G. Grey, Home Secretary, and of Mr. Walpole, ex-H. Secy., before Com<sup>n.</sup> on Capital Punish<sup>t.</sup>, *Com. Pap.* 1866, v. 21; *Hans. D.* v. 196, p. 1616.

In the exercise of this prerogative, the secretary of state is called upon to pay regard to the moral aspect of the case, as contrasted with the legal; and he is also obliged to consider, to some extent, the popular feeling in the community at large.<sup>1</sup> The royal prerogative may be exercised more than once in reference to the same case; thus, where a person has been sentenced to death for a capital crime, and the punishment has been commuted to one of penal servitude for life, the prerogative may be subsequently interposed for the mitigation of the sentence. But this is only done in cases of an exceptional character.<sup>2</sup> And the crown can only deal with the whole punishment; it has no power to remit a portion of the sentence merely.<sup>3</sup> But the crown may extend its mercy on what terms it pleases, and consequently may annex to its pardon any condition that it thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend. But the consent of the felon must be given to a change of punishment; for the crown cannot compel a man, against his will, to submit to a different punishment from that which has been awarded against him in due course of law.<sup>4</sup>

Whenever the crown is memorialized, through the home secretary, for the remission of a capital sentence, if any circumstances are stated in the memorial which ought to have an influence upon the decision, or any new facts alleged, apparently in favour of the prisoner, it is invariably sent to the judge, unaccompanied by any expression of opinion, for his report thereon.<sup>5</sup>

<sup>1</sup> Lord Chancellor and others on Hall's case, *Hans. D. v. 174*, pp. 862-866.

<sup>2</sup> *Hans. D. v. 184*, p. 463.

<sup>3</sup> *Ld. Cairns, Hans. D. v. 194*, p. 1326.

<sup>4</sup> Hawkins, *P. C. bk. 2*, c. 37, sec. 45; Forsyth, *Const. Law*, pp. 460, n. 463; Stephen, *Com. Ed.* 1874, v. 1, p. 148. In 1849, after W. Smith O'Brien, and others concerned in the rising in Ireland, in 1848, had been convicted of high treason, the queen was pleased to commute their sentence to transportation for life. But the prisoners refused this act of mercy, and insisted that their own assent was required to the commutation of the sentence. They based their claim, not upon general principles, but upon the wording of certain statutes affecting Ireland. The law officers of the crown protested against this argument; nevertheless, the government introduced a Bill into parliament to remove all doubts upon the point, which became law (*Hans. D. v. 106*, p. 395; 12 & 13 Vict. c. 27).

<sup>5</sup> Home Sec<sup>y</sup>. Hardy, *Hans. D. v. 190*, p. 567.

Frequently the home secretary and the judge confer together upon the case. Besides which the secretary has always the benefit of the ability and experience of the permanent under-secretary of state, in addition to the depositions, the judge's notes at the trial, and any other information he may require to assist him in finally adjudicating upon the case. With this aid he is in a position to assume full and sole responsibility for the advice he may tender to the sovereign in every such instance; and, although dissatisfaction is occasionally expressed in regard to the decisions of the Home Office when the prerogative of mercy is invoked, the current of enlightened opinion is decidedly opposed to any change in the present practice.<sup>1</sup>

And here it should be observed that criminal cases only come under the notice of the home secretary upon an application for a remission or mitigation of sentence by the mercy of the crown, and are never submitted to his consideration on the ground that the sentence is too lenient. The conduct of a judge in such circumstances can only be reviewed by parliament.<sup>2</sup> It is estimated that not less than one thousand memorials in relation to sentences of penal servitude and capital punishment are annually presented to the Home Office.<sup>3</sup> The general principles which influence the home secretary in advising the remission of sentences of penal servitude, whether such sentences were for life or for a term of years, were explained to the House of Commons by Mr. Secretary Walpole, on March 15, 1867.<sup>4</sup>

The issue of a proclamation of amnesty, or oblivion for past offences against the crown and government of the realm, is within the acknowledged prerogative of the crown, and an amnesty or pardon may thus be granted by the crown either before or after attainder or conviction,<sup>5</sup> and also by a colonial governor acting under royal instructions.<sup>6</sup> Ordinarily, however,

<sup>1</sup> See summary of evid. in Rpt. of Com<sup>n</sup>. on Capital Punish<sup>t</sup>., *Com. Pap.* 1866, v. 21, pp. xvii-xix.

<sup>2</sup> *Hans. D.* v. 199, p. 1629; *Ib.* v. 200, p. 1430.

<sup>3</sup> *Ib.* v. 190, p. 566.

<sup>4</sup> *Ib.* v. 185, p. 1929; v. 174, p. 1270. And in regard to capital punishment, see *Ib.* v. 186, p. 734; v. 198, p. 869.

<sup>5</sup> 1 Inst. 120 a, note 4; 3 Inst. 233; Bishop, *Crim. Law*, c. 59, "Pardon." But see colonial practice in Ld. Kimberley's circular despatch to Australian governors in 1871, *Com. Pap.* 1875, v. 53, p. 627.

<sup>6</sup> *Ex. gra.* Sir G. Grey in N. Zealand, in 1865; Ld. Durham in L.



the exercise of the power of pardon is limited to the case of individual criminals, after conviction.<sup>1</sup> But in Upper Canada, after the insurrection of 1837, an Act of the provincial parliament was passed, which empowered the lieutenant-governor (by and with the advice of the Executive Council), upon the petition of any person charged with high treason, praying to be pardoned, to grant him a conditional pardon before his arraignment.<sup>2</sup> But, since confederation, the exercise of the prerogative of mercy has been withdrawn from the lieutenant-governors of the Canadian provinces, because they are no longer appointed by the crown, and is resident only in the governor-general of Canada in virtue of his commission.<sup>3</sup>

No interference by either House of Parliament with the exercise of this prerogative is justifiable, except in extraordinary circumstances. It was said by Macaulay, that "he would rather entrust it to the hands of the very worst ministry that ever held office than allow it to be exercised under the direction of the very best House of Commons;"<sup>4</sup> and by Sir Robert Peel, that he would leave this prerogative in the hands of the executive, considering that it was the right and duty of the House to interfere only "if there be a suspicion that justice is perverted for corrupt purposes."<sup>5</sup>

Lord Brougham, in his treatise on the "British Constitution," dwells at considerable length, and with great sagacity, upon the principles which should influence the executive government in the exercise of this prerogative of pardoning or commuting the sentences of criminals. He sums up his observations with the following

Canada, in 1838; Sir G. F. Bowen in N. Zealand, in 1871; Ld. Dufferin in Canada, in 1875.

<sup>1</sup> *Jls. N. Zealand, H. of Rep.* 1872, App. v. 1, A. No. 1, a, p. 10.

<sup>2</sup> Stat. Can. 1 Vict. c. 10; and see Lt.-Gov. Arthur's despatch of 20 Aug. 1838, in relation to this statute, commenting on apparently conflicting claims of the gov. gen. of Canada, and Lt.-gov. of U. C., in the exercise of prerog. of mercy. *Jls. Ass<sup>d</sup>. U. C.* 1839; App. v. 2, pt. 2, p. 625. As to powers of colonial governors in exercise of this prerog. see Forsyth, *Cases and Op<sup>s</sup>*. pp. 75-82, 460.

<sup>3</sup> *Can. Sess. Pap.* 1869, No. 16.

<sup>4</sup> *Hans. D.* v. 84, p. 892.

<sup>5</sup> *Mir. of Parl.* 1835, p. 1581.

weighty words: "It seems hardly necessary to add that no interference of parties interested, politically or personally, should ever be permitted with the exercising of this eminent function of the executive government. Absolute monarchies offer to our view no more hideous features than this gross perversion of justice. Nor do popular governments present a less hateful aspect when they suffer the interference of the multitude, either by violence, or through the press, or the debate, or any other channel in which clamour can operate, to defeat the provisions of the law."<sup>1</sup>

While direct interference with the discretion of the crown in the exercise of the pardoning power is only warranted in extreme cases of manifest injustice, it is competent for parliament to receive petitions from or on behalf of criminals under sentence, and, if sufficient cause is shown to justify inquiry, to appoint committees for that purpose. A Mr. Palmer, who was condemned for seditious practices, by the High Court of Justiciary, in Scotland, in 1794, petitioned the House of Commons complaining of the illegality and undue severity of his sentence. The reception of his petition was at first opposed by Mr. Pitt, as being irregular and unjustifiable, but, after an adjourned debate on the question, it was agreed to without a division.<sup>2</sup> Since then no objection has been offered to the reception of petitions from or on behalf of prisoners complaining of their sentences, of their treatment by the court, or in prison, and praying relief, or for the remission of their sentences.<sup>3</sup> And every facility is allowed to prisoners to memorialize parliament or the Home Office for redress of grievances.<sup>4</sup>

It has not been unusual for inquiries to be made of the administration in parliament as to the circumstances attending the imposition or remission of sentences imposed either at the assizes or by local criminal courts having summary jurisdiction, so as to afford the ministry an opportunity of explaining erroneous impressions in the

Inquiries of  
ministers.

<sup>1</sup> Brougham, *Brit. Const.* pp. 330-332.

<sup>2</sup> *Parl. Hist.* v. 30, pp. 1449-1461.

<sup>3</sup> See Index to *Pub. Pets. H. of C.* and see proceedings on motion for an address to the crown for removal of a state prisoner from one place of confinement to another, "where he may not be subjected to the treatment which he now endures" (*Mir. of Parl.* 1840, p. 3534).

<sup>4</sup> *Hans. D.* v. 189, p. 1217.

public mind.<sup>1</sup> The government exercise their own discretion as to whether they deem it expedient to reply to such questions or not. But it has been stated by ministers, in both Houses, in reply to questions on the subject, that, "as a general principle, it would be inconvenient and unusual to lay before the House the grounds on which that discretion proceeds which dictates leniency or severity on the part of the responsible advisers of the crown."<sup>2</sup> For the same reason, it is not usual to communicate to parliament memorials or other papers on the subject of the exercise of this prerogative in particular cases.<sup>3</sup>

### 3. *Honours and Rewards.*

Presuming that none can judge so well of the merits and services of the subjects of the realm as the crown itself, by whom they are governed or employed, the constitution has entrusted to the sovereign the sole power of conferring dignities, honours, and titular distinctions upon his people; in confidence that he will make use of the same in behalf of none but those who deserve distinction or reward.<sup>4</sup> But this prerogative, like every other function of royalty, is exercised upon the advice of responsible ministers.

It is a constitutional principle of great importance that all honours should be bestowed by the spontaneous action of the crown, and not necessarily at the instigation of ministers; such advice, however, may be tendered by way of suggestion to the sovereign through the prime minister.<sup>5</sup> No interference with this prerogative by either House of Parliament should ordinarily take place, for the obvious reason that, if it were understood that the good will and recommendation of parlia-

<sup>1</sup> *Mir. of Parl.* 1835, p. 2511; *Ib.* 1837-8, p. 239; *Hans. D.* v. 163, pp. 1324, 1325; v. 164, pp. 1734, 1824.

<sup>2</sup> *Mir. of Parl.* 1840, p. 1702; *Hans. D.* v. 168, p. 1187; *Ib.* v. 200, p. 421.

<sup>3</sup> Case of Greenland, *Hans. D.* v. 189, pp. 871-876; *Ib.* v. 234, p. 1441. In Hall's case, in 1812, papers were granted by government, but no further proceedings took place (*Parl. Deb.* v. 23, pp. 467, 934).

<sup>4</sup> Act 34 & 35 Vict. c. 53; Bowyer, *Const. Law*, p. 174; Petersdorff, *New Abdt.* v. 6, p. 535.

<sup>5</sup> Lord Grey, *Hans. D.* v. 192, p. 1813; Mr. Gladstone, *Ib.* v. 193, p. 1835; Mr. Disraeli, *Ib.* v. 223, p. 975; Martin, *Life of P. Consort*, v. 3, p. 478; Torrens, *Life of Ld. Melbourne*, v. 2, p. 169; *Welln. Desp.* 3rd ser. v. 7, pp. 180, 366.

ment was the road to honorary distinction, there would be an end to all true responsibility; and the favour of private members would be sought after instead of the approbation of the crown.<sup>1</sup>

Nevertheless, exceptional cases may arise, and have arisen, to justify the Houses of Parliament in approaching the sovereign with their advice and recommendations in regard to the exercise of this prerogative, and on behalf of meritorious public servants, whose claim to the favour of the crown had been either overlooked or disregarded.

Advice of  
parliament  
thereon.

Foreign orders, decorations, or medals cannot be accepted by British subjects without express licence from the crown. Such leave is never granted unless to reward active and distinguished service against an enemy, or actual employment in the service of the sovereign who confers the distinction, or attendance upon a foreign sovereign to convey to him an order from the British monarch. The rules governing the practice in such cases were established by Lord Castlereagh in 1812,<sup>2</sup> and were revised in 1870; they are strictly maintained, although they may not be legally enforceable.<sup>3</sup>

It is very undesirable that parliament should interfere with the discretion of the crown in this particular; and, if any representation were made by parliament thereon, it ought to be in general terms, so as to leave to the crown as much liberty as possible in dealing with the subject. At the same time opinions expressed by any considerable number of members of parliament would go far to induce the proper minister to consider whether the rules applicable thereto could not be modified with advantage.<sup>4</sup> No rules have been laid down as to British subjects receiving *titles* from foreign sovereigns. It rests entirely with the crown whether the acceptance of such a title should be sanctioned or not.<sup>5</sup>

By constitutional usage, it is customary, in the case of

<sup>1</sup> Clode, *Mil. Forc.* v. 2, p. 327; *Hans. D.* v. 139, p. 1532.

<sup>2</sup> They will be found in Hertslet's Foreign Office List.

<sup>3</sup> Queen Victoria's letter to Emperor Napoleon, in Martin, *Life of P. Consort*, v. 3, p. 472; *Ib.* v. 5, pp. 392-394; *Welln. Desp.* 3rd ser. v. 5, pp. 321, 406; Lord Derby, *Hans. D.* v. 229, p. 1265; *L. Times*, Nov. 9, 1878, p. 19.

<sup>4</sup> Mr. Gladstone, *Hans. D.* v. 208, pp. 1491, 1650, 1771; *Ib.* v. 214, p. 773.

<sup>5</sup> Lord Derby, *Ib.* v. 229, p. 1415.

speakers of the House of Commons, on their final retirement from the chair, to address the crown to confer upon them "some signal mark of royal favour."

This is responded to, on the part of the sovereign, by their elevation to the peerage, and by a message to the House of Commons recommending that pecuniary provision may be made for the support of the dignity.<sup>1</sup> The creation

of peers<sup>2</sup> is a peculiar and incommunicable privilege of the sovereign, over which parliament has no control; saving that it must be exercised upon the advice of responsible ministers.<sup>3</sup>

In December, 1711, by a stretch of the prerogative, twelve new peers were created at once, professedly for the purpose of overruling, or rather inverting, the majority in the upper chamber upon a great political question.<sup>4</sup> In 1832, a similar encroachment upon the independence of the House of Lords was contemplated, for the purpose of carrying the Reform Bill; but the crisis was happily averted by the prudence of the opposition.

In 1856, the right of the crown to create peerages for life was, after investigation and debate, denied by the House of Lords. The question was raised in the case of Mr. Parke, an eminent lawyer, upon whom a life peerage, with the title of Baron Wensleydale, was conferred, for the avowed purpose of strengthening the appellate jurisdiction in the Upper House. It was not contended that the sovereign was debarred from conferring this description of honour upon any of her subjects, but merely that, in conformity to the usage and practice of the constitution, since it has been defined and settled in its best days—namely, from the revolu-

<sup>1</sup> Rt. hon. C. M. Sutton, *Mir. Parl.* 1831-2, pp. 3467, 3486, 3502; Rt. hon. C. S. Lefevre, *Hans. D.* v. 144, pp. 2126, 2271, 2300.

<sup>2</sup> The process of making a peer, and the fees payable upon patents of dignities, as well as upon official appointments, generally, will be found in *Com. Pap.* 1867, v. 39, p. 425. In the case of peerages conferred for military or naval services, but not in the case of civil peerages, it is the rule for the expenses to be borne by the country (*Hans. D.* v. 210, p. 103). For procedure in contested claims to peerage, see a paper in *Law Mag.* v. 8, 4th ser. p. 173.

<sup>3</sup> May, *Const. Hist.* v. 1, c. 5; *Mir. Parl.* 1839, p. 1705; *Hans. D.* v. 188, p. 1127; Hearn, *Govt. Eng.* pp. 415-436; Bagehot, *Eng. Const.* p. 288. In regard to the choice of candidates for this honour, see *Welln. Desp. Civ. S.* v. 6, p. 563.

<sup>4</sup> Stanhope, *Queen Anne*, p. 507.

tion of 1688 downwards—neither the patent creating a life peerage nor the writ of summons issued in pursuance thereof entitled the grantee to sit and vote in parliament.<sup>1</sup> This point having been decided by the House of Lords, after an examination of precedents, Lord Wensleydale, who, in February, 1856, had been created a baron “for and during the term of his natural life,” refrained from attempting to take a seat in that House. But on July 25 following, the Government, acquiescing in this decision, created him an hereditary peer.

By an Act passed in 1871 for the preservation of the dignity and independence of parliament, bankrupt peers Disqualified peers. are disqualified from sitting or voting in the House of Lords.<sup>2</sup>

The usage of parliament permits the adoption, by either House, of resolutions of thanks to officers of the army or navy and others, who have rendered military service, for meritorious conduct in their official capacity. Votes of thanks by parliament. Votes of thanks “should be proposed in both Houses, and with such a concurrence of opinion that there could be no doubt of their being unanimously passed.”<sup>3</sup> Various rules have been prescribed by precedent in respect to votes of this description. In the first place, it has been customary that all such motions should emanate from a member of the administration, acting on behalf of the crown, as the source and fountain of honour.<sup>4</sup> This rule has not been without exception, though motions for votes of thanks which have proceeded from private members have rarely been successful.<sup>5</sup>

It is contrary to the practice of parliament to propose thanks to officers, by name, who are under the rank of general or commodore, or who are not in chief command in the action;<sup>6</sup> but “the several officers, non-commissioned officers, and privates” engaged, are often thanked collectively.<sup>7</sup> After the

<sup>1</sup> Rep. Com<sup>o</sup>. of Privileges, agreed to by House of Lords, Feb. 25, 1856, *Hans. D.* v. 140, pp. 263, 508, 591, 898, 1121, 1289.

<sup>2</sup> 34 & 35 Vict. c. 50.

<sup>3</sup> Mr. Disraeli, *Hans. D.* v. 149, p. 252.

<sup>4</sup> *Parl. Hist.* v. 33, p. 3; *Hans. D.* v. 149, p. 255; *Ib.* v. 203, p. 725.

<sup>5</sup> See, for example, *Com. Jour.* v. 49, p. 742, and the proceedings on July 11, 1806.

<sup>6</sup> Peel, in *Mir. Parl.* 1841, p. 222; G. Hardy, *Hans. D.* v. 218, p. 428.

<sup>7</sup> See general indices, *Com. Jour. Hans. D.* v. 136, p. 324.



suppression of the Indian mutiny, thanks were voted, collectively, to the gallant civilians, who had voluntarily performed military service on that occasion, with courage and self-devotion.<sup>1</sup> Thanks were also voted, on December 15, 1854, to "General Canrobert and the French army, for their gallant and successful co-operation with her Majesty's land forces" in the Crimea: and Field-Marshal Lord Raglan was desired to convey to them the resolution. Votes of thanks should be founded on official papers, announcing the completion of the service for which the thanks are to be given.<sup>2</sup>

It is usual to await the conclusion of operations before voting thanks in parliament; and not to propose them after a brilliant exploit, which has left the operations or the victory incomplete.<sup>3</sup> And they are only voted for successes, and could not therefore be given to General Williams for his gallant defence of Kars, as that fortress was ultimately surrendered.<sup>4</sup>

It has not been customary to give the thanks of parliament for victories, however brilliant, meritorious, or complete, unless they took place against a power with whom Great Britain was, at the time, in a state of formal recognized war.<sup>5</sup> Of late years, however, and especially in the case of military operations in India, this has not been insisted upon.<sup>6</sup> In proposing thanks for successes in India, it has been the uniform practice to confine the expression of the same to the military operations and arrangements, keeping out of view the question of the policy and origin of the war, for which the government are alone responsible.<sup>7</sup>

Votes of thanks are always confined to the survivors; there is no precedent of resolutions of approval being adopted in regard to the conduct of deceased officers, of whatsoever rank or merit.<sup>8</sup> In 1834, however, a general resolution of appreciation, sympathy, and condolence, was adopted in reference to the heroes who fell in the Crimean campaign.<sup>9</sup>

If names intended to have been included in a vote of thanks are accidentally omitted, or if errors occur therein, they may

<sup>1</sup> *Hans. D.* v. 148, p. 827.

<sup>2</sup> *Ib.* v. 192, p. 925.

<sup>3</sup> Peel, *Hans. D.* v. 71, p. 553.

<sup>4</sup> *Hans. D.* v. 141, pp. 1847, 1878.

<sup>5</sup> *Mir. Parl.* 1828, p. 189.

<sup>6</sup> *Hans. D.* v. 72, pp. 542, 571.

<sup>7</sup> *Mir. Parl.* 1840, p. 801; *Hans. D.* v. 66, p. 206.

<sup>8</sup> Peel, in *Hans. D.* v. 84, p. 421.

<sup>9</sup> *Ib.* v. 136, p. 326.

be subsequently corrected, on motion to that effect.<sup>1</sup> Or, the order may be discharged, so as to admit of one more complete being adopted.<sup>2</sup>

In 1843, when it was proposed to include the name of Sir Henry Pottinger, plenipotentiary and envoy-extraordinary to China, in a vote of thanks for successful operations during the war with that country, Sir R. Peel said, "There is no instance in which a diplomatic agent of the government has received the thanks of parliament for the successful completion of any negotiation however important, or of any treaty however advantageous to the interests of the country;" adding, "I think it of great importance to adhere in these matters strictly to precedents . . . which, I think, have been founded upon good sense; otherwise, every omission that we happened to make in a vote of this nature would imply a censure."<sup>3</sup> This principle was afterwards explained and enforced by Lord Palmerston, who said that "parliament seemed to have systematically avoided votes of thanks to negotiators, and most properly, because a negotiator was a person acting under the instructions of his government. The government had a majority in parliament, and a vote of thanks to their negotiator was, in fact, a vote of thanks to themselves."<sup>4</sup>

The granting of charters to corporations, conferring upon them certain exclusive rights, privileges, and immunities, is also a matter of prerogative, and is exercised by order in council. In former times, this prerogative was of very wide extent, and implied an absolute legislative power on the part of the crown, by virtue whereof charters of liberties were granted to the people, both at home and abroad; which were all, more or less, in the nature of public laws. The growth and progress of our political institutions, however, have gradually restrained the authority of the crown in this particular within recognized limits, and now no charter conferring political power or fran-

Prerogative in granting charters.

<sup>1</sup> *Mir. Parl.* 1840, pp. 814, 1137; *Ib.* 1841, p. 499; *Hans. D.* v. 136, p. 424.

<sup>2</sup> *Hans. D.* v. 66, pp. 572, 573.

<sup>3</sup> *Ib.* v. 68, p. 1237. Votes of thanks were, however, carried in exceptional circumstances in 1843 to Lord Ashburton, envoy-extraordinary to Washington, for the manner in which he had conducted the negotiations which had resulted in the Treaty of Washington (*Ib.* v. 68, pp. 641, 1159 1217, 1241).

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chise in Great Britain or her colonies can be granted by the crown, without the concurrence of parliament.

And the crown cannot create corporations with powers which transcend the law. Thus, it may not create a corporation to enjoy a monopoly, or with power to tax the rest of the community. When a corporation is to be created with privileges of this description, the authority of the legislature must be invoked to supply the deficiencies of the royal prerogative.<sup>1</sup> The House of Commons in 1693 resolved "that it is the right of all Englishmen to trade to the East Indies or any part of the world, unless prohibited by Act of Parliament." This resolution destroyed the monopoly granted by royal charter to the East India Company; it has ever since been held that no power but that of the whole legislature can give to any person or to any society an exclusive privilege of trading to any part of the world.<sup>2</sup> The "Statute of Monopolies," passed in 21 James I. c. 3, put an end to a number of monopolies; but an exception was made therein of the prerogative right to grant certain exclusive rights, or letters patent, to inventions of new manufactures. But in 1852 the exercise of this prerogative came to be wholly regulated by Act of Parliament.<sup>3</sup>

It is customary in the colonies, possessing representative institutions, for Acts to be passed by the local legislatures, constituting and incorporating colleges and universities therein. It has heretofore been deemed to be necessary to invoke the exercise of the royal prerogative for the grant of letters patent to such institutions, for the purpose of enabling them to confer degrees, which shall be recognized as equivalent to degrees granted by universities in the mother country. In the grant of such powers the crown will exercise discretion to ensure that no degrees shall be sanctioned other than those conferred by similar institutions, and particularly by the great English universities, on which these new institutions are professedly modelled, in order that uniformity in procedure may exist among universities having the sanction of royal letters patent.<sup>4</sup>

<sup>1</sup> Bowyer, *Const. Law*, p. 412.

<sup>2</sup> Macaulay, *Hist. of Eng.* v. 4, p. 475; Forsyth, *Const. Law*, p. 434; *Am. Law. Rev.* v. 7, p. 737.

<sup>3</sup> *Hans. D.* v. 222, p. 245.

<sup>4</sup> Lord Carnarvon's Desp. to Gov. Normanby of N. Zealand, dated

By an Act passed in 1871, it is provided that a copy of any application for the foundation of any college or university, which may hereafter be referred for the consideration of any committee of the Privy Council, shall, together with a draft of the proposed charter, be laid before both Houses of Parliament for not less than thirty days before any report thereon shall be submitted to the crown.<sup>1</sup>

Procedure in  
founding a  
college, or

Corporations for local and municipal purposes must be created in the mode prescribed by law for the exercise of that portion of the royal prerogative, and with the incidents legally essential to their nature.<sup>2</sup> For example, her Majesty has been expressly empowered by statute, on petition of the inhabitant householders, to grant, with the advice of her Privy Council, a charter of incorporation, according to the provisions of the Municipal Corporation Act, to any town or district, and to create the same a municipal borough.<sup>3</sup>

creating a  
corporation.

The crown is also at liberty to give royal charters to private associations, a prerogative which is exercised upon the advice of the Board of Trade; but this practice has long been regarded as of doubtful propriety. One of the objects of the Companies Act of 1862 was to substitute a general law for an exceptional privilege.<sup>4</sup>

Royal  
charters.

The crown has ever exercised, and still retains, the prerogative of incorporating universities, colleges, companies, and other public bodies, and of granting to them, by charter, powers and privileges not inconsistent with the law of the land, while, at the same time, similar powers are now conferred by Act of Parliament.<sup>5</sup> But public associations for commercial purposes ordinarily require powers which can only be conferred by legislation. Even long-established

Charters and  
corporations.

Jan. 22, 1875; Canada Acts of 1843 and 1852; Quebec Stat. 1870, for Bishop's College, Lennoxville.

<sup>1</sup> 34 & 35 Vict. c. 63; *Hans. D.* v. 220, p. 1348; v. 221, pp. 762, 1373.

<sup>2</sup> See stat. cited in Bowyer, *Const. Law*; *Hans. D.* v. 189, p. 597.

<sup>3</sup> Bowyer, *Const. Law*, p. 399, n.; New Municipal Corp. Act, 1882, pt. xi.

<sup>4</sup> *Hans. D.* v. 389, p. 851. But the abstract right of issuing such charters still remains in the crown (*Ib.* v. 196, p. 356).

<sup>5</sup> See proceedings in House of Commons in reference to granting of a royal charter to the Univ. of London, *Mir. Parl.* 1833, pp. 1842, 2740. In 1869 the royal charter granted in 1836 to Univ. College, London, was annulled, and the university incorporated by 32 & 33 Vict. c. 23.

institutions, such as the Bank of England, which were originally created by royal charter, have of late years derived their extraordinary privileges, like other public companies, from legislative enactments.<sup>1</sup>

All charters or grants of the crown may be repealed or revoked when they are contrary to law, or uncertain or injurious to the rights and interests of third persons; and the appropriate process for the purpose is by writ of *scire facias*. To every crown grant there is annexed by the common law an implied condition that it may be repealed by *scire facias* by the crown, or by a subject grieved, using the prerogative of the crown upon the fiat of the attorney-general.<sup>2</sup>

Moreover, all private corporations are subject to the control of the law, and may be proceeded against for illegal acts or abuse of powers, either by a special action on the case, or by writ of mandamus or of *quo warranto*, according to the nature of the alleged offence or misdemeanour. Where the legal remedy against a corporation is inadequate a court of equity will interfere and restrain unlawful proceedings by the issue of an injunction.<sup>3</sup>

While a corporation may be dissolved by a forfeiture of its charter by ordinary legal process, parliament itself may also interfere, and by an Act of its own put an end to the existence of a body which has misused or abused the powers entrusted to it. Under the British constitution, parliament is omnipotent, and may at any time dissolve a corporation created by the crown or by Act of Parliament. But such is the respect which is shown by British law to private property and private rights that there have been very few instances, and those mainly determined upon grounds of public policy, wherein parliament has thought proper to dissolve any corporate body, or to interfere without their consent with the exercise of powers originally conferred upon them. As a rule, it is left to the courts of law to regulate and restrain the proceedings of all corporations within the limits of their original charters.<sup>4</sup>

<sup>1</sup> Amos, *Fifty Years Eng. Const.* p. 126.

<sup>2</sup> Forsyth, *Const. Law*, p. 387.

<sup>3</sup> Angell and Ames, *Corporations*, c. 11, 20, 21.

<sup>4</sup> *Ib.* §§ 766, 767; Bryce, *Ultra Vires*, ed. 1880, p. 786; Dwarries on Statutes, 2nd ed. p. 650; *Hans. D.* v. 198, pp. 1127-1134, 1338; *Am. L. Rev.* v. 8, pp. 222-229.

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## PART III.

### *THE HISTORY OF THE CABINET.*

#### CHAPTER I.

##### THE ORIGIN OF THE CABINET, AND THE POSITION OF OFFICE HOLDERS IN PARLIAMENT.

IN the chapters which have been included in the first part of the present edition of this work, and which are taken almost exclusively from the first volume of the original edition, Mr. Todd has traced the gradual evolution of the privy council, and its history under prerogative and parliamentary government. In the chapters which follow, and which are chiefly taken from the second volume of the original edition, Mr. Todd has described the manner in which the cabinet was evolved, and has described the functions of the particular ministers who compose it. The increasing power of the cabinet, he has been at pains to point out, has been accompanied by a decrease in the authority of the privy council.

In theory, indeed, the privy council<sup>1</sup> still retains its ancient supremacy, and, in a constitutional point of view, is presumed to be the only legal and responsible council of the crown. All formal acts of sovereignty, such as the issue of orders in council, or royal proclamations, must be performed through its instrumentality, and cabinet ministers themselves derive their authority and responsibility, in the eye of the law, from the circumstance that they have been sworn in as its members. But in practice, since 1688, the privy council has dwindled into a mere department of state, of comparative insignificance, so far as the actual direction of public affairs is concerned, when contrasted with its original authoritative and pre-eminent position. Its judicial functions, heretofore so formidable, are

<sup>1</sup> Mr. Todd's own narrative commences at this point.



now restrained within very narrow limits. The power of taking examinations and issuing commitments for high treason is the only remaining relic of its ancient authority in criminal matters. It continues to exercise an original jurisdiction in advising the crown concerning the grant of charters, and it has exclusively assumed the appellate jurisdiction over the colonies and dependencies of the crown which formerly appertained to the council in parliament. But, ever since the revolution, it has been the appropriate duty of parliament, either directly or indirectly, to afford redress in all cases wherein the common law fails to give relief.<sup>1</sup>

As at present constituted, the privy council is an assembly of state advisers, unlimited in number, and appointed absolutely (without patent or grant) at the discretion of the sovereign, who may dismiss any individual member, or dissolve the whole council, at his pleasure.<sup>2</sup> No qualification is necessary in a privy councillor, except that he be a natural-born subject of Great Britain. And even this disability may be removed, by special Act of Parliament, as in the cases of Prince Leopold, afterwards king of the Belgians, and of the late Prince Consort.<sup>3</sup> It has never been the practice to impose upon the crown a statutory obligation to appoint any one to the office of privy councillor.<sup>4</sup>

Formerly the duration of the privy council was only during the lifetime of the sovereign, but it is now continued for six months longer (by Stat. 6 Anne c. 7), unless dissolved by the new monarch. But, according to the present usage, the privy councillors of the preceding reign are re-sworn upon the accession of a new sovereign.

<sup>1</sup> Palgrave, *King's Council*, pp. 110, 125.

<sup>2</sup> The name of Charles James Fox was struck out of the privy council in 1798, upon the advice of Mr. Pitt, on account of an intemperate and seditious speech at a club dinner (Jesse, *Life of Geo. III.* v. 3, p. 194; Russell's *Life of Fox*, v. 3, p. 168). But in January, 1806, after Pitt's death, the king sanctioned the re-admission of Mr. Fox into his councils (Jesse, *Geo. III.* v. 3, pp. 361, 472). Lord Melville's name was struck out in anticipation of an address to the king from the House of Commons, that he be dismissed from the royal presence for ever (Stanhope's *Pitt*, v. 4, pp. 283-285, 294). His lordship was afterward re-sworn of the council, having been acquitted of the charges preferred against him (Haydn, *Book of Dig.* p. 135; see Cobbett's motion against Sir R. Peel).

<sup>3</sup> By 56 Geo. III. cc. 12, 13; by 3 & 4 Vict. cc. 1, 2.

<sup>4</sup> Ld. Ch. Selborne, *Hans. D.* v. 215, p. 1477.

A privy councillor, although he be but a commoner, is styled "right honourable" (which is the proper title of a "lord") because he is a "lord of her Majesty's privy council."<sup>1</sup> He has precedence over all knights, baronets, and younger sons of barons and viscounts. There is no salary or emolument attached to the office; and the acceptance, by a member of the House of Commons, of a seat in the privy council, does not void his election.<sup>2</sup>

The oath of office, as it was anciently imposed upon every privy councillor,<sup>3</sup> is recorded in *Coke's Institutes*,<sup>4</sup> and is to the following effect: 1. To advise the king in all matters to the best of his wisdom and discretion. 2. To advise for the king's honour and advantage, and for the public good, without partiality and without fear. 3. To keep secret the king's counsel, and all transactions in the council itself. 4. To avoid corruption in regard to any matter or thing to be done in council. 5. To forward and help the execution of whatsoever shall be therein resolved. 6. To withstand all persons who shall attempt the contrary. 7. And generally to observe, keep, and do all that a good and true councillor ought to do unto his sovereign lord. The oath of office now taken by a privy councillor is given in the Report of the Oaths Commission,<sup>5</sup> together with the following declaration, which embodies the substance of the oath, and which it is recommended shall be substituted for it: "You shall solemnly and sincerely declare that you will be a true and faithful servant unto her Majesty Queen Victoria, as one of her Majesty's privy council. You shall keep secret all matters committed and revealed unto you, or that shall be secretly treated of in council, and generally in all things you shall do as a faithful and true servant ought to do to her Majesty." Privy councillors must also take the oath of allegiance, as prescribed by the Promissory Oaths Act of 1868.<sup>6</sup>

<sup>1</sup> *Notes and Queries*, 5th ser. v. 5, p. 76.

<sup>2</sup> *Hans. D.* v. 174, p. 1197.

<sup>3</sup> See Stubbs, *Const. Hist.* v. 2, p. 560. Near relations of the sovereign are usually admitted to a seat in the privy council without being sworn (Haydn, *Book of Dignities*, pp. 120, 129, 137, 145).

<sup>4</sup> 4 Inst. 54.

<sup>5</sup> *Com. Pap.* 1867, v. 31, p. 84; *Ib.* 1876, v. 61, p. 275.

<sup>6</sup> 31 & 32 Vict. c. 72.

The obligation of keeping the king's counsel inviolably secret is one that rests upon all cabinet ministers, and other responsible advisers of the crown, by virtue of the oath which they take when they are made members of the privy council. Nothing that has passed between the sovereign and his ministers, in their confidential relations with each other, may be disclosed to any other person, or to either House of Parliament, without the express permission of the sovereign.<sup>1</sup> And this permission would only be accorded for purposes of state, as to enable a minister to explain and justify to parliament his political conduct. It would not be granted for the purpose of enabling parliament to scrutinize the motives of a political act which was not itself impeachable on public grounds. Neither would it be given with a view to subject the secret counsels of the crown to the review of an ordinary legal tribunal.

The necessity for obtaining leave from the crown to divulge past proceedings, or communications between the sovereign and his confidential servants, applies with equal force to actual ministers, and to those who have ceased to take part in the royal councils.<sup>2</sup>

After the separate existence of the cabinet council as a governmental body, meetings of the privy council gradually ceased to be holden for purposes of deliberation. Early in the reign of George III., we find this distinction between the two councils clearly recognized—that the one is assembled for deliberative, and the other merely for formal and ceremonial purposes.<sup>3</sup> It is now an established principle, that “it would be contrary to constitutional practice that the sovereign should preside at any council where deliberation or discussion takes place.”<sup>4</sup> For the cabinet has superseded the privy council for all the higher purposes of the government; and this small select body, whose very existence has hardly extended over two centuries, and which has still no formal recognition in the constitution, has

<sup>1</sup> *Mir. of Parl.* 1831-2, p. 2134.

<sup>2</sup> *Ib.* 1831-2, p. 2069; *Ib.* 1834, p. 2645.

<sup>3</sup> *Grenville Papers* (anno 1761), v. 1, p. 374; Lewis, *Adm.* p. 388.

<sup>4</sup> Lord Granville, *Hans. D.* v. 175, p. 251. See Gray's *Early Years of Pr. Consort*, p. 363 n.; *Mir. of Parl.* 1835, p. 7; Campbell, *Chan.* v. 4, pp. 317 n. 499.

become the supreme governing body in the political system of Great Britain.

The practice of consulting a few confidential advisers, in preference to, and instead of, the whole privy <sup>Cabinet</sup> council, was doubtless resorted to by the sovereigns of England from a very early period. Stubbs says that from the close of the minority of Henry III. we first distinctly trace the action of an inner royal council, distinct from the *curia regis* and from the common council of the realm.<sup>1</sup> Bacon (in his *Essays on Councils*) cites the example of "King Henry VII., who, in his greatest business, imparted himself to none, except it were to Morton and Fox." While affairs of state were, for the most part, debated in the privy council, in presence of the king, it naturally happened that some councillors, more eminent than the rest, should form juntos or cabals, for closer and more secret co-operation, or should be chosen by the sovereign as his most intimate and confidential advisers. These statesmen came at length to be designated as the cabinet, from the circumstance of their deliberations being conducted in an inner room, or cabinet, of the council apartments in the royal palace. But no resolutions of state, or other overt act of government, were finally taken without the deliberation and assent of the privy council, who then, as now, were the only advisers of the crown recognized by law.<sup>2</sup>

We first meet with the term "cabinet council," in contradistinction to that of privy council, in the reign <sup>First mention</sup> of Charles I. Clarendon, in his *History of the* <sup>of a cabinet.</sup> *Rebellion*, after describing the condition of the government at the time the great Council of Peers was convened at York by the king, in September, 1540, and mentioning that the burthen of state affairs rested principally upon the Archbishop of Canterbury, the Earl of Strafford, and Lord Cottington, proceeds to state that some five or six others being added to them, on account of their official position and tried ability, "these persons made up the committee of state (which was reproachfully after called the *Juncto*, and enviously then in court the *Cabinet Council*), who were upon all occasions, when the secretaries received any extraordinary intelligence, or were to make any extraordinary despatch, or as often otherwise as

<sup>1</sup> Stubbs, *Const. Hist.* v. 2, pp. 40, 240, 255.

<sup>2</sup> Hallam, *Const. Hist.* v. 3, p. 249.

was thought fit, to meet: whereas the body of the council observed set days and hours for their meeting, and came not else together except specially summoned."<sup>1</sup> In another place he says the practice then prevailed of admitting many persons of inferior abilities into the privy council merely as an honorary distinction, and thus the council grew so large that, "for that and other reasons of unaptness and incompetency, committees of dexterous men have been appointed out of the table to do the business of it." And he remarks that one of the grounds of Strafford's attainder was a discourse of his "in the committee of state, which they called the *Cabinet Council*."<sup>2</sup> Again, in his *Autobiography*, he mentions that when, after Lord Falkland's death, in 1643, Lord Digby replaced him as secretary of state, "he was no sooner admitted and sworn secretary of state and privy councillor, and consequently made of the junto which the king at that time created—consisting of the Duke of Richmond, the Lord Cottington, the two secretaries of state, and Sir John Colepepper—but the chancellor of the exchequer (Clarendon himself, then Mr. Hyde) was likewise added; to the trouble, at least the surprise, of the master of the rolls (Sir J. Colepepper), who could have been contented that he should have been excluded from that near trust, where all matters were to be consulted before they should be brought to the council-board."<sup>3</sup>

The introduction of this method of government was exceedingly distasteful to the whole community. It was one of the innovations against which the popular feeling was directed in the first years of the Long Parliament. The Grand Remonstrance, addressed by the House of Commons to Charles I., in 1641, set forth that such councillors and other ministers of state only should be employed by the king as could obtain the confidence of parliament.<sup>4</sup> And in the Second Remonstrance, issued in January, 1642, complaint is made of "the managing of the great affairs of the realm in cabinet councils, by men unknown and not publicly trusted."<sup>5</sup>

During the protectorate of Cromwell, cabinets were unknown.

<sup>1</sup> Clar. *Hist. Reb.* book 2, p. 226 (edit. 1819).

<sup>2</sup> *Ib.* book 3.

<sup>3</sup> Clar. *Autobiog.* v. 1, p. 85.

<sup>4</sup> Forster's *Grand Remonstrance*, pp. 272, 273.

<sup>5</sup> Clar. *Hist. Reb.* book 4, p. 537; and see book 7.



The government of the country was conducted by the supreme will of the great dictator, assisted by a council of state, which should at no time exceed twenty-one members, nor be less than thirteen. But public affairs were chiefly transacted by certain committees of parliament, until it became evident that these committees were assuming too much authority, when the Long Parliament itself was summarily abolished by this mighty autocrat, who was not disposed to submit his will to constitutional restraints. The legislative assemblies subsequently convened by Cromwell were too much under his own control to offer any serious obstructions to his government.

Immediately upon the restoration of monarchy, in 1660, the privy council was reconstituted by the king, and resumed its original functions. But the public mind at this period was not in the humour to reopen the difficult question of the relations between the sovereign and parliament; and Charles II. was too fond of pleasure, and of his own prerogative, to be willing to agree to anything which would encroach upon either. But he was not averse to an attempt to render the privy council itself more efficient. For, after the Restoration, the privy council included all those who had been members of the privy council of Charles I., amongst whom were faithful royalists; but there were also some who had espoused the cause of the parliament. The number of councillors,<sup>1</sup> and the doubtful loyalty of some of them, rendered the existing body an unsafe and inefficient instrument for the direction of public affairs. Accordingly, at the suggestion of Hyde, the lord chancellor, and virtual head of the administration, a plan was devised for the subdivision of the Privy Council into separate committees, to each of which should be assigned a special class of subjects.<sup>2</sup> This was but the carrying out of a reform already provided for by the regulations of 1553,<sup>3</sup> under which we find, in the reign of James I., a committee of the council appointed for war, that included several of the king's principal ministers; and another committee for foreign affairs. It was

<sup>1</sup> For a list of the privy councillors of England from the Restoration to 1850, see Haydn, *Book of Dignities*, pp. 119-146.

<sup>2</sup> Lister, *Life of Clarendon*, v. 2, p. 6; Cox, *Eng. Govt.* p. 648.

<sup>3</sup> See *ante*, p. 43.



now proposed that there should be a committee for foreign affairs; a committee for admiralty, naval, and military affairs; a committee for petitions of complaint and grievance; and a committee for trade and foreign plantations. Furthermore, that "if anything extraordinary happens which requires advice, whether in matters relating to the Treasury, or of any other mixed nature, other than is afore determined, his Majesty's meaning and intention is, that particular committees be in such cases appointed for them as hath been heretofore accustomed; such committees to make their report in writing to be offered to his Majesty at the next council day following. If any debate arise, the youngest councillor to begin, and not to speak a second time."<sup>1</sup>

It is doubtful whether all these committees were actually organized at this time. But the so-called committee for "foreign affairs"—which consisted of the lord chancellor and five others, mostly his intimate friends and adherents—took the lead and became in reality a cabinet council, to whom alone the king entrusted the secrets of his policy, and wherein was discussed, invariably in the presence of the king, all the most important affairs of state, both foreign and domestic, before they were submitted to a general meeting of the privy council. This confidential committee virtually superseded the rest of the council, who were only consulted on formal occasions. In connection with the formation of this cabinet, or cabal, as it was then termed, the king greatly increased the number of the whole council; and thus obtained a valid reason for employing only a select body of his advisers. For Charles II. had an extreme dislike to the formality of long discussions in full council,<sup>2</sup> adverting to which, in 1679, his Majesty thanked the whole body of his councillors for all the good advice they had given him, "which," he added, "might have been more frequent if the greater number of this council had not made it unfit for the secrecy and despatch that are necessary in many great affairs. This forced him to use a smaller number of you in a foreign committee (the cabal), and sometimes the advices of some few among them upon such occasions, for many years past."<sup>3</sup>

<sup>1</sup> Cox, *Eng. Govt.* p. 648.

<sup>2</sup> Dicey, pp. 65, 66.

<sup>3</sup> *Ib.* p. 66; and see *Temple's Memoirs*, v. 3, p. 45 n.

Of the first ministry of Charles II. we are informed by Clarendon,<sup>1</sup> that "the treasurer (Southampton), the Marquis of Ormond, General Monk, with the two secretaries of state, were of that secret committee, with the chancellor (Clarendon himself), which, under the notion of foreign affairs, were appointed by the king to consult all his affairs before they came to a public debate."<sup>2</sup> And Roger North, referring to this period, says that "the cabinet council consisted of those few great officers and courtiers whom the king relied upon for the interior dispatch of his affairs;" and that, while "at first it was but in the nature of a private conversation, it came to be a formal council, and had the direction of most transactions of the government, foreign and domestic."<sup>3</sup> These cabinet meetings were holden, for a time, about twice in a week; but after a while, for the greater convenience of the king and his ministers, it became

Cabinet  
meetings under  
Charles II.

customary to hold them upon Sunday evenings. Every Lord's Day, the great officers of state would attend the king at morning service in the royal chapel, and be at hand to wait upon him in the evening, for consultation on public affairs.<sup>4</sup>

Charles II. was a monarch who coveted the possession of arbitrary power. He therefore naturally preferred to avail himself of the services of a few trusty councillors, whom he could choose from amongst their less pliant colleagues. Hallam tells us that "the delays and decencies of a regular council, the continual hesitation of lawyers, were not suited to his temper, his talents, or his designs." And it must be confessed that the privy council, as it was then constituted, was too numerous for the practical administration of government. "Thus by degrees it became usual for the ministry or cabinet to obtain the king's final approbation of their measures before they were laid, for a mere formal ratification, before the privy council."<sup>5</sup> Nevertheless, we are assured by Clarendon, who, as lord chancellor, took an active part in all these proceedings, that the cabinet "never transacted anything of moment (his Majesty being always present) without presenting

<sup>1</sup> Continuation of his *Life*, p. 27.

<sup>2</sup> And see Thomas, *Hist. Public Offices*, p. 23.

<sup>3</sup> *Life of Ld. Guildford*, v. 2, p. 50.

<sup>4</sup> Campbell's *Chan.* v. 3, pp. 191 n. 475.

<sup>5</sup> Hallam, *Const. Hist.* v. 3, p. 250; *Parl. Hist.* v. 5, p. 733.

the same first to the council-board." He adds, that while at first they were "all of one mind, in matters of importance," yet that after about two years, the king added others to this cabinet "of different judgment and principles, both in Church and State," to himself, whereby his own influence with the king was considerably impaired.<sup>1</sup>

The "cabal" ministry lasted about three years, and was Unpopularity of government. very unpopular. Nor need we wonder at this; for, whatever might be the advantages of cabinet government, the check upon the will of the sovereign which was, to some extent, afforded by a body so numerous and influential as the privy council, was lost sight of, if not altogether removed, when the administration was placed in the hands of a secret oligarchy. The "cabal" ministry was broken up in 1674. Sir Thomas Osborne, soon after created Earl of Danby, then became chief minister, and retained office until 1678. The history of England at this period is that of a continual struggle between the crown and the commons, during which time the executive was never more profligate and anti-national, or representative government more factious and corrupt.<sup>2</sup> Lord Danby, being impeached by the commons for treasonable practices, was sent to the Tower. For a short interval public affairs were in a miserable plight. The parliament became daily more and more violent; while the king's authority was so low, that it seemed as difficult to dissolve parliament as to carry on the government without a dissolution.

At this juncture his Majesty applied to Sir William Temple, Sir W. Temple's scheme. one of the foremost statesmen of the age, and by his advice was induced to accept a new scheme of administration. This was nothing less than an ingenious attempt to combine the advantages of the old system of government by a council with those of the modern device of government by means of a cabinet, selected from amongst the principal parliamentary leaders. As a necessary preliminary, the existing privy council was dissolved, and a new one appointed, which consisted of only thirty persons. Of these, one half were selected from the chief officers of the

<sup>1</sup> Lord Clarendon's Address to the House of Lords upon his impeachment in 1667, *State Trials*, v. 6, p. 376.

<sup>2</sup> *Dacey*, p. 66; Knight, *Hist. of Eng.* v. 4, ch. 20.

crown and household, including also the archbishop of Canterbury and the bishop of London. The remaining moiety were chosen from among the leading members of both sides of the two Houses of Parliament, without office, but being required, as an indispensable qualification, to be possessors of large estates. This council was presided over by a lord president, who, however, had neither the authority nor the influence of a prime minister. Otherwise, this new-fangled privy council bore some resemblance to a modern cabinet; but with the all-important difference, that there was no agreement that all the councillors should concur in carrying into effect, and supporting in parliament, the decision of the majority upon questions of public policy; or even that they should abstain from parliamentary opposition to each other.<sup>1</sup> And, although the goodwill of parliament was sought to be conciliated at the first formation of the new council, its continued existence was not made to depend upon its retaining that goodwill.

In the selection of persons to compose this council, Temple's idea was that the leading interests of the whole community should be represented therein. Thus, the archbishop of Canterbury and the bishop of London were "to take care of the Church;" the lord chancellor and the chief justice to "inform the king well of what concerns the laws;" the peers and landed gentry, by their large possessions, to be fit representatives of the national wealth, so that "at the worst, and upon a pinch," they might "out of their own stock furnish the king, so far as to relieve some great necessity of the crown."<sup>2</sup>

On April 21, 1679, the king nominated his new council, and in person announced its formation to parliament, informing them that he had made choice of such persons as were worthy and able to advise him; and that he was resolved, in all his weighty and important affairs, next to the advice of his great council in parliament (which he should very often consult with), to be advised by them.<sup>3</sup> But, though planned for the express purpose of conciliating the approbation of parliament, this novel scheme of administration wholly failed to obtain public confidence. And with reason, for it aimed at

<sup>1</sup> *Temple's Memoirs*, by T. P. Courtney, v. 2, pp. 34-74.

<sup>2</sup> *Ib.* v. 2, p. 34; Dicey, p. 66.

<sup>3</sup> *Lords Jour.* v. 13, p. 530.

reconciling two inconsistent principles; the appointment of some ministers solely because they were acceptable to the king, and of others merely for the sake of their influence in parliament. It was, moreover, of too unwieldy dimensions for a governing body. For there was to be no interior cabinet; but all the thirty were to be entrusted with every political secret, and summoned to every meeting.<sup>1</sup> Notwithstanding its apparent plausibility, and the welcome accorded to it by some of the most eminent statesmen of the day, this elaborate device was of very short-lived duration. Parliament received it coldly, and no wonder: since, on Temple's own admission, the authority of the new council was designed to counterbalance the increasing influence of the legislature. Internal dissensions arose in the council itself, through the introduction of certain members who were opposed to the court; and at last Temple dealt a finishing stroke to his own creation, by consenting to form an interior council therein; though the essence of his scheme had been that the whole body should always be consulted. After the failure of this notable project, the king, in open disregard of his solemn engagement to the contrary, sought thenceforth to govern according to his own caprice.<sup>2</sup>

Failure of  
Temple's  
scheme.

Ephemeral and impracticable as it was, Temple's project is not without interest, as it serves to mark an important stage in the transition from government by prerogative, administered through the whole privy council, and parliamentary government through the instrumentality of a cabinet.

During the rest of the reign of Charles II., as well as during the short and stormy career of his unfortunate successor, the king's council shared the odium and unpopularity of its royal master. James II. introduced into it several Roman Catholics, who were naturally regarded by the nation with mistrust. But the great blot in its composition continued to be that which was pointed out in the Grand Remonstrance, namely, that it did not consist of men in whom parliament was willing to repose confidence. Its proceedings, moreover, were conducted with such secrecy, that it was impossible to determine upon whom to affix the responsibility of any obnoxious measure. After a very brief duration,

Continued  
unpopularity of  
the council.

<sup>1</sup> Macaulay, *Hist. of Eng.* v. I, p. 241.

<sup>2</sup> *Dicoy on the Privy Council*, p. 67.



James's unpopular reign terminated in his abdication and flight. With the revolution, which placed the house of Orange upon the throne of England, a new era commenced, full of promise to the friends of constitutional government. During the earlier part of the reign of William III., however, nothing was done to improve the efficiency of the privy council, beyond the selection of men to form part of it in whom the king himself could thoroughly confide. Relying upon his personal popularity, and unwilling to share his authority with others, the king was reluctant to make any change which would lessen his own power. At length an opportunity presented itself whereby the parliament could exact from the crown additional guarantees for constitutional rights. It was necessary to make legislative provision for the succession of the crown, in the Protestant line, in default of issue of the reigning sovereign, and of the Princess Anne, the heiress presumptive, by acknowledging the right of Princess Sophia, of Hanover, and her issue, being Protestants, to inherit the throne. Parliament took advantage of this juncture to obtain the grant of further liberties, which should take effect upon the accession of the house of Hanover.

*The revolution.*

*Subsequent condition of the council.*

: In the Act of Settlement (12 & 13 William III. c. 2) a clause was introduced—aimed at the existence of the obnoxious "cabinet," which continued to be unpopular in parliament<sup>1</sup>—enacting, that from and after the time aforesaid, "all matters and things relating to the well governing of this kingdom, which are properly cognisable in the privy council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon shall be signed by such of the privy council as shall advise and consent to the same." But this provision, as we have already noticed in a former chapter,<sup>2</sup> proved abortive, and was repealed before it came into operation.<sup>3</sup> It was founded upon error, as it endeavoured to enforce the responsibility of ministers without its natural correlative, namely, their recognized presence in the two Houses of Parliament to render an account of their stewardship.

*Act of Settlement.*

Meanwhile, the House of Commons, having proved its

<sup>1</sup> See *Parl. Hist.* vol. v. pp. 722-733.

<sup>2</sup> See *ante*, p. 55.

<sup>3</sup> By 4 Anne, c. 8, sec. 24.



strength, was rapidly acquiring increased power. But, for the want of proper control, it was a prey to caprice, indecision, endless talking to no purpose, and factious squabbling. "The truth was that the change which the revolution had made in the House of Commons had made another change necessary; and that other change had not yet taken place. There was parliamentary government: but there was no ministry."<sup>1</sup> In other words, although the chief offices in the government were filled by persons who sat in parliament, yet these offices "were distributed not unequally between the two great parties," and "the men who held those offices were perpetually caballing against each other, haranguing against each other, moving votes of censure on each other; exhibiting articles of impeachment against each other; and, as a natural consequence, the temper of the House of Commons was wild, ungovernable, and uncertain."<sup>2</sup>

In this juncture, a plan was happily devised, which, while it was calculated to conserve the weight and influence that rightly appertained to the crown in the conduct of public business in parliament, also afforded the means of successfully controlling its turbulent majorities, and of permanently conciliating their goodwill. By the advice of Sunderland, the king resolved to construct a ministry upon a common bond of political agreement, the several members of which, being of accord upon the general principles of state policy, would be willing to act in unison in their places in parliament. Gradually, as opportunity offered, the Tory element in the existing administration was eliminated, so that, at last, its political sentiments were in harmony with the prevailing opinions of the majority of the House of Commons. When this had been accomplished, the servants of the crown in parliament possessed the double advantage of being the authorized representatives of the government, and the acknowledged leaders of the strongest party in the popular chamber. By this happy contrivance the parliament, through whose patriotic endeavours the monarchy had been restored and the liberties of the people effectually consolidated, was recognized as "a great integral part of the constitution, without which no act of government could have a real vitality."

State of the  
House of  
Commons.  
  
First parlia-  
mentary  
ministry.

<sup>1</sup> Macaulay, v. 4, p. 444.

<sup>2</sup> *Ib.* p. 437.

Such a thing as the formal introduction of the king's ministers into parliament, for the purpose of representing the crown in the conduct of public business therein, had been previously unknown in England. It is true that from an early period, various ministers of state, and subordinate officers of the executive government, had obtained entrance, from time to time, into the House of Commons; there being no legal restriction to prevent any number of servants of the crown from sitting in that assembly. The presence of the functionaries served, no doubt, to increase the influence of the crown over the deliberations of parliament; but they occupied no authoritative position in the popular chamber; the House, in fact, merely tolerating their presence, and often entertaining the question whether they should be permitted to retain their seats or not.<sup>1</sup>

Placemen in House of Commons from an early period.

We read that "in Henry VII.'s time, and Henry VIII.'s, ministers of state, officers of the revenue, and other courtiers, found an account in creeping, through boroughs, into the House of Commons."<sup>2</sup> As a natural result of this proceeding, it is mentioned, in a debate on placemen in parliament, in 1680, that, in the 20th year of Henry VIII., there was an Act passed to release to the king certain loans he had borrowed, which Act "was much opposed, but the reason that is given why it passed is, because the House was mostly the king's servants; but it gave great disturbance to the nation."<sup>3</sup>

The presence of the king's ministers in the House of Lords was a matter of course, and unavoidable, because the chief ministers of state were generally chosen from amongst the peers of the realm, who have always been regarded as the hereditary councillors of the crown. But though they were thereby in a position to do the king much service, by furthering his plans in parliament,<sup>4</sup> we have no proof that they were authorized to represent the government in their own chamber, in the modern acceptation of the term. They would naturally address their brother peers with greater authority, when holding high offices of state; but this could not materially affect their relations towards the house itself, so long as parliamentary government

Ministers in the House of Lords.

<sup>1</sup> *Hats. Prec.* v. 2, pp. 22, 42.

<sup>2</sup> *Gurdon, Hist. of Parls.* v. 2, p. 355.

<sup>3</sup> *Parl. Hist.* v. 4, p. 1269. <sup>4</sup> *Gurdon, Hist. of Parls.* v. 2, p. 366.

was unknown, because it is essential to that system that there should be official representation in both branches of the legislature, and especially in the House of Commons. Even had it been possible for a parliamentary government to have been administered through the House of Lords alone, "the effect would have been the depression of that branch of the legislature which springs from the people, and is accountable to the people, and the ascendancy of the monarchical and aristocratical elements of our polity."<sup>1</sup>

It was some time before the commencement of the present century that it became customary for a fair proportion of cabinet ministers to sit in the House of Commons. Until then, from at least the epoch of the Restoration, the political power of the Lords had been dominant alike over the crown and the people—a supremacy which continued to exist until the passing of the first Reform Bill—and during this period the members of the House of Lords had evinced a decided superiority over those of the Commons in education, refinement of manners, in liberality of sentiment, and in political wisdom, as well as in the possession of political power.<sup>2</sup>

Ministers in  
the House of  
Commons.

Privy  
councillors in  
House of  
Commons,

We are unable to determine when privy councillors were first permitted to sit in the House of Commons. It was alleged in a debate in the House in 1614, that "anciently" no "privy councillor, nor any that took livery of the king," was "ever chosen" to that assembly. But in the reigns of Edward VI. and his royal sisters (1547-1603) mention is made of privy councillors and great officers of state as having seats therein.<sup>3</sup> And in 1614, it being remarked that several privy councillors had got seats, no one seemed desirous of removing them.<sup>4</sup>

In the event of members of the Lower House being appointed to offices of state, or places of profit under the crown, it was customary, prior to the revolution of 1688, to permit

<sup>1</sup> Macaulay, *Hist. of Eng.* v. 4, p. 340.

<sup>2</sup> See Buckle, *Hist. of Civ.* pp. 409-411; *West. Rev.* v. 54, p. 1, etc.; T. Rogers, in *N. Am. Rev.* v. 131, p. 44. etc. [Mr. Todd's conclusion will hardly be accepted by historians. All the greatest ministers of the period—Somers, Godolphin, Charles Montagu, Harley, Walpole, the two Pitts, Canning—began life as commoners, and, indeed, as the sons of commoners.—*Editor.*]

<sup>3</sup> See *post*, p. 242.

<sup>4</sup> *Parl. Hist.* v. 1, p. 1163.

them to continue in the undisturbed possession of their seats, unless the nature of their employment required a continued residence abroad, or in Ireland, or in the colonies; or unless they were assistants or attendants at the House of Lords, as in the case of the judges and crown officers. Thus, in 1575, it was resolved by the House of Commons, that any member being "in service of ambassade," shall not in any wise be amoved from his place, nor any other be elected during such term of service.<sup>1</sup> In 1606, the Speaker informed the House that he had received a letter from the lord chancellor stating that, since the previous session, his Majesty had appointed certain members of the House on special services: to wit one, as chief baron of the exchequer in Ireland; another, as treasurer at war in Ireland; others, as ambassadors to France and Spain, respectively; and another as attorney-general; and desiring "to know the pleasure of the House whether the same members were to be continued, or their places supplied with others." The matter was referred to a committee of privileges, who were charged to consider also the case of a member who had been appointed master of the ordnance in Ireland, and of another, who had been sent on a foreign embassy. Upon the report of this committee, the seats of the chief baron, treasurer, and master of the ordnance in Ireland, who were presumed to hold their patents for life, were declared void, and new writs ordered; but the ambassadors were permitted to remain. The case of attorney-general gave rise to much difference of opinion; and finally, the House evaded any direct decision thereon, by refusing to allow a question to be made of it.<sup>2</sup> In 1609, a new writ was ordered in the case of a member appointed to be governor of a colony in America.<sup>3</sup> With regard to members appointed to be judges of the courts of law in England, the question was raised in 1604, whether such persons "ought to have place in the Higher House, or sit here during the same parliament;" but no resolution was come to by the House at that time.<sup>4</sup> In 1605, it was resolved, upon a report from the committee of privileges, that two members of the

<sup>1</sup> *Com. Jour.* v. 1, p. 104.

<sup>2</sup> *Ib.* v. 1, pp. 315, 323.

<sup>3</sup> *Ib.* p. 393.

<sup>4</sup> *Ib.* p. 248. Thorp, a baron of the exchequer, was Speaker of the House of Commons 31 Henry VI., Comyn's *Digest*, *Parl. D.* 9.

House of Commons, "being attendants as judges in the Higher House, shall not be recalled."<sup>1</sup> In 1620, a motion was made for a new writ in place of a member appointed chief justice of the king's bench, but the decision thereon is not recorded.<sup>2</sup> And in 1649, it was resolved, that the several judges of the upper bench, common pleas, and public exchequer, that are or shall be members, who have accepted, or shall accept, of the said places, be excused their attendance in this House whilst they shall execute the said places.<sup>3</sup> But there is no order for the issue of a new writ in any such cases. It is not until after the restoration of Charles II. that we find it expressly stated that new writs were issued in the case of members of the House of Commons appointed to the bench in England.<sup>4</sup>

The foregoing are instances which are to be found in the Journals of the House of Commons—previous to the year 1694, when the first Act of Parliament was passed upon the subject—of the issue of new writs upon the appointment of members to office under the crown. The case of the attorney-general, which was specially commended to the consideration of the House by the king, was peculiar; he being one of the officers who were summoned, at the beginning of every parliament, by writ under the great seal, to attend as an assistant and adviser in the House of Lords.<sup>5</sup> On this occasion, however, the House declined to decide the question either way, and the attorney-general ventured to take his seat "by connivance."<sup>6</sup> But in 1614, after a committee to search for precedents, it was resolved that "Mr. Attorney-General Bacon [the famous Sir Francis Bacon, who, previous to his election, had received this appointment] remain in the House for this parliament, but never any attorney-general to serve in the Lower House in future." It was argued in the debate upon this case that heretofore "no attorney-general was ever chosen." In 1620, in 1625, and

<sup>1</sup> *Com. Jour.* v. 1, p. 257.

<sup>2</sup> *Ib.* v. 1, p. 513.

<sup>3</sup> *Ib.* v. 6, p. 395.

<sup>4</sup> *Ib.* v. 8, pp. 80, 104, 187, 510, 535.

<sup>5</sup> Macqueen, *House of Lords*, pp. 35, 42.

<sup>6</sup> In regard to the alleged disqualification of "men of the law following business in the king's courts" to sit in parliament, an unconstitutional prohibition, based on an ordinance of 46 Edward III., which enacts that no such persons "shall be accepted or returned as knights of the shire," see Stubbs' *Const. Hist.* v. 3, p. 257; *Hans. D.* v. 207, pp. 1345, 1875.



again in 1640, this order excluding the attorney-general from the House was strictly enforced, and new writs were issued when members were appointed to that office.<sup>1</sup> In 1661, at the request of the House of Commons, leave was granted by the House of Lords for the attorney-general to repair to the House of Commons, for the purpose of giving information "concerning some business wherein his Majesty is concerned."<sup>2</sup> Sir Heneage Finch, afterwards Lord Nottingham, was the one on whose behalf this rule of exclusion was abandoned. He was promoted from the office of solicitor-general to that of attorney-general in 1670, whilst a member of the House of Commons, and he was allowed to retain his seat without question.<sup>3</sup> Since then this functionary has usually been one of the most prominent and important members of the Lower House.

The solicitor-general was more fortunate. Twice, in 1566 and in 1580, he was "adjudged to be a member," notwithstanding his holding this post, and was directed to leave the House of Lords, where he had been summoned as an "attendant," and take his seat in the Nether House.<sup>4</sup> And no question has ever been raised as to his eligibility for a seat in the House of Commons.

Gradually, under the Tudor dynasty, we find the chief ministers of state, having seats in parliament, beginning to be employed, to some extent, as mouth-pieces of the crown, to make known the will of successive sovereigns to their faithful Commons. The Commons, too, availing themselves of the presence in their midst of certain crown officers, began at this era to make use of them as channels for conveying to the crown the expression of their particular wants.

Ministers in  
Parliament  
under the  
Tudor  
monarchs.

Thus, in the reign of Queen Mary, a curious circumstance is recorded in the *Commons Journal*, which illustrates the position occupied by ministers of the crown towards parliament at that period:

On November 7, 1558, her Majesty sent for the Speaker of the House of Commons, and ordered him to lay before the House the ill condition the nation was

A.D. 1558.

<sup>1</sup> General Index, *Com. Jour.* vols. 1-17 (published in 1852), p. 422.

<sup>2</sup> *Lords Jour.* v. 2, p. 290.

<sup>3</sup> Campbell, *Lives of the Chan.* v. 3, p. 390.

<sup>4</sup> General Index, *Com. Jour.* vols. 1-17, p. 425; *Parl. Hist.* v. 1, p. 1163.



in by the war with France ; but the Commons were so dissatisfied, that they granted no subsidy. So on November 14, the lord treasurer, lord chancellor, and several other peers, went to the Commons' House, and sat "in the privy councillors' place there," and showed the necessity for a subsidy to defend the nation against the French and Scots, and then they withdrew ; upon which the Commons immediately entered into debate about the matter recommended to their consideration by the lord chancellor (who was the mouthpiece of the Lords), and spent that day and the two following, without coming to any resolution. On November 17, the death of the queen occurred, and the sessions was abruptly terminated.<sup>1</sup>

In the reigns of Edward VI. and Queen Elizabeth, the members of the Privy Council sitting in "the Nether House" are mentioned as being ordinarily employed to communicate orders of the House to the king ; and reference is made in the Journals to certain officers of state, *e.g.* the treasurer of the household, the comptroller of the household, and the secretary of state, as having seats in the House of Commons, and being deputed to convey messages between the sovereign and that chamber.<sup>2</sup> And all Queen Elizabeth's privy councillors, who had seats in the House of Commons, are declared to have joined in opposing a motion for the release of some members of the House whom the queen had imprisoned, on the ground that, "as her Majesty had committed these persons for reasons best known to herself, it was not to be doubted that she would, of her gracious disposition, shortly release them of her own accord."<sup>3</sup>

In the reign of James I., the chancellor of the exchequer, the secretary of state, and the chancellor of the  
James I. duchy of Lancaster, appear to have had seats in the House of Commons, and were employed in the transmission of messages, and other communications on the business of parliament, between the House and his Majesty.<sup>4</sup>

But, in addition to these high functionaries, many minor office-holders also contrived to get elected to the House of Commons, and they united their strength to further the

<sup>1</sup> Gurdon, *Hist. of Parls.* v. 2, p. 383 ; *Com. Jour.* v. 1, p. 52.

<sup>2</sup> *Com. Jour.* v. 1, pp. 8, 9, 55, 56, 61 ; D'Ewes' *Jour.* pp. 45, 80, etc.

<sup>3</sup> Parry's *Parls.* p. 233.

<sup>4</sup> Gurdon, *Hist. of Parls.* v. 2, pp. 428, 443, 461, 462, 473, 474.

interests of the court, as opposed to those of the parliament. Of such an old member of the parliament of Charles I. testifies: "It was my fortune to sit here a little while in the Long Parliament; I did observe that all those who had pensions, and most of those that had offices, voted all of a side, as they were directed by some great officer, as exactly as if their business in this House had been to preserve their pensions and offices, and not to make laws for the good of them that sent them here. How such persons could any way be useful for the support of the government, by preserving a fair understanding between the king and his people, but, on the contrary, how dangerous to bring in arbitrary power and popery, I leave to every man's judgment."<sup>1</sup> Accordingly, it was one of the first measures of the republican party, when they became supreme in the Long Parliament, to pass the "self-denying ordinance," in 1644, by which it was enacted, "That during the time of this war (between the king and parliament), no member of either house should have or execute any office or command, civil or military."<sup>2</sup>

Charles I.

Attempts to  
exclude place-  
men from the  
House.

After the restoration of the monarchy, a bill to prevent members of the House of Commons from taking upon them any public office was presented and read twice, in 1675, but it was afterwards rejected on division.<sup>3</sup> And, in 1679, a bill to provide that when any member of this house is preferred by the king to any office, or place of profit, a new writ shall immediately issue for the electing of a member to serve in his stead, was ordered,<sup>4</sup> but never presented. At length, on December 30, 1680, in the 32nd year of the reign of Charles II., it was resolved by the House of Commons, *nem. con.*, that no member of this House shall accept of any office, or place of profit, from the crown, without the leave of this House; or any promise of any such office, etc., during such time as he shall continue a member of this House; and that all offenders herein shall be expelled this House.<sup>5</sup> This resolution, however, can only be regarded as an expression

<sup>1</sup> Sir F. Winnington, *Parl. Hist.* v. 4, p. 1265.

<sup>2</sup> See Gen. Index, *Com. Jour.* (1547-1714), p. 996; *Hats. Prec.* v. 2, p. 67 n.

<sup>3</sup> *Com. Jour.* v. 9, pp. 321, 327.

<sup>4</sup> *Ib.* p. 609.

<sup>5</sup> *Parl. Hist.* v. 4, p. 1270.

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of opinion, indicative of a growing change in the public mind in regard to the purity and free action of parliament. The House of Commons was not constitutionally competent, of its own mere motion, to create a disability to a seat in parliament where none already existed; or to exclude from their midst any one who had been duly returned as the representative of a city or borough, without the concurrence of the co-ordinate branches of the legislature. We need not, therefore, be surprised that no attempt was made by the House to enforce their resolution; and that the evil against which it was aimed continued unabated, until it was gradually removed by legislative enactments, to which our attention will be presently directed.

On the restoration of the monarchy, however, Charles II. and his advisers clearly perceived the necessity for some better understanding between the executive government and the Houses of Parliament than had heretofore prevailed. So the king appointed his principal ministers, Lord Chancellor Hyde, "and some others" (most likely including the members of the Committee on Foreign Affairs, which had begun to act as a cabinet council), "to have frequent consultations with such members of parliament who were most able and willing to serve him, and to concert all the ways and means by which the transactions in the Houses might be carried with the more expedition, and attended with the best success."<sup>1</sup> This clumsy device probably suggested to Sir William Temple the introduction of the "unofficial members" from the ranks of members of either House, which formed part of his short-lived scheme for the reorganization of the Privy Council, a few years afterwards. But nothing came of this ingenious attempt at carrying on the king's government in harmony with the rising power of parliament.

It was not until the formation by William III. of his first parliamentary ministry, that we find any instance in our constitutional history of the cordial reception by the House of the ministers of the crown, in order that they might represent and be answerable for the great interests of the nation in that assembly. For hitherto, although the king's ministers might happen to have seats in parliament,

<sup>1</sup> Lister, *Life of Clarendon*, v. 2, p. 7.

there had been no ministry that claimed to be associated together on principles of mutual agreement. In the words of Macaulay, "under the Plantagenets, the Tudors, and the Stuarts, there had been ministers; but there had been no ministry. The servants of the crown were not, as now, bound in frank-pledge for each other. They were not expected to be of the same opinion, even on questions of the gravest importance. Often they were politically and personally hostile to each other, and made no secret of their hostility."<sup>1</sup> But a brighter day was dawning. The sagacity of William enabled him to discern the importance of unanimity of opinion amongst the chief advisers of the crown; and also the necessity for a harmonious agreement between his councillors and the Houses of Parliament, in regard to the general policy of his government.

Nevertheless, at the outset, the king appears to have had no very clear ideas as to the lawful extent of ministerial responsibility, or as to the position which his ministers should occupy towards the two Houses.<sup>2</sup> The natural course of events gradually brought about the settlement of these difficult questions, and contributed to shape the project of the king to greater and more desirable consequences than he could himself foresee. Wisdom and unanimity in council, vigour in action, and a cordial understanding between the sovereign and parliament, might reasonably be expected to follow from the harmonious incorporation of the ministers of the crown with the legislative body. And these beneficial results have not been wanting, whenever ministers have been sufficiently strong to frame a decided policy, and sufficiently popular to commend their policy to the favourable consideration of parliament.

But we are not to suppose that such an important change in the political system of England was effected at once. It was several years after his accession to the throne before William III. began to form a regular ministry. His first cabinets were not constructed upon any principle of unity. The members composing them were not even obliged to be agreed upon questions of the utmost gravity. The administration was in fact a government by separate and independent departments, acknowledging no

<sup>1</sup> Macaulay, *Hist. of Eng.* v. 3, p. 13.

<sup>2</sup> *Ib.* v. 4, p. 437.

bond of union except the authority of the sovereign, their common head and lord. In every successive administration, Whigs and Tories were mingled together, in varying preponderancy. By this method, the king hoped to secure his own ascendancy, and to conciliate the rival factions in the state.<sup>1</sup> It is obvious that a ministry so constituted was not in a position to command the respect of parliament, or to exercise an adequate control over its deliberations. But as the power of parliament, and especially of the House of Commons, was steadily on the increase, and as its attitude towards the government was becoming daily more antagonistic, the king determined upon the experiment of substituting for the individual direction of public affairs the administration of a party, and of confiding the chief offices of government to leading Whigs, who at that time were the strongest party in the House of Commons.<sup>2</sup> But in the endeavour to carry out this happy idea, which may justly be regarded as the main-spring of parliamentary government, a difficulty presented itself which for a while jeopardised, and threatened to frustrate altogether the king's design.

The evils attendant upon the presence of placemen in the House of Commons had become so serious that, as we have already seen, it had been unanimously resolved, some ten years before the time when the king began to entertain the thought of a parliamentary ministry, that no member of the House, without express leave of the House itself, should accept any office, or place of profit under the crown, under penalty of expulsion.<sup>3</sup> This resolution, however, had proved entirely abortive, and since its adoption the House had continued to swarm with placemen of all kinds, from high officers of state to mere sinecurists and dependents upon the court.<sup>4</sup> A more constitutional attempt to remedy this great abuse, than was afforded by the adoption of a mere resolution of the House of Commons, was made in 1692, by the introduction of a Bill "touching free and impartial proceedings in parliament,"—the object of which was to dis-

Placemen in  
the House of  
Commons.

<sup>1</sup> Macaulay, *Hist. v.* 3, pp. 13, 65, 537; v. 4, pp. 184, 299, 372.

<sup>2</sup> *Ib.* v. 4, p. 437; Knight, *Pop. Hist. of Eng.* v. p. 167.

<sup>3</sup> See *ante*, p. 239.

<sup>4</sup> Macaulay, *Hist. of Eng.* v. 4, pp. 121, 337; *Parl. Hist.* v. 4, p. 1377 n.; v. 5, p. 468.



qualify all office-holders under the crown from a seat in the Lower House. This Bill passed through all its stages in the House of Commons rapidly, and without a single division, but was rejected by the House of Lords.<sup>1</sup> In 1693, another Bill was passed by the Commons, substantially the same as its predecessor. This measure was agreed to by the Lords with the important proviso that all office-holders whose seats should be vacated under this Act might "be afterwards chosen again to serve in the same parliament." The Commons concurred in this amendment; but the king, who regarded the whole measure as an encroachment upon his prerogative, refused to give it the royal assent.<sup>2</sup>

In this very year, however, a partial remedy was applied to this monstrous evil, by the adoption of a resolution, in connection with the Bill of Supply granting certain duties of excise, "that no member of the House of Commons shall be concerned, directly or indirectly, in the farming, collecting, or managing of the duties to be collected by this Bill, or any other aid to be granted to their majesties, other than the present commissioners of the treasury, and the officers and commissioners for managing the customs and excise."<sup>3</sup> This resolution was added to the Bill, and became law.<sup>4</sup> It is memorable as being the first statutable prohibition of any office-holder from sitting and voting as a member of the House of Commons. The principle thus introduced was afterwards applied and extended by similar Acts passed in this reign;<sup>5</sup> the provisions whereof were rigidly enforced by the expulsion from the House of several members who had transgressed their provisions.<sup>6</sup>

But these Acts were too limited in their operation to meet the emergency of the case. Accordingly, we find Place Bills, to the same general purport as the Bill of 1692, above mentioned, again submitted to the House of Commons, in 1694,

<sup>1</sup> *Parl. Hist.* v. 5, p. 745 n.

<sup>2</sup> Macaulay, *Hist of Eng.* v. 4, pp. 337-342, 479. The Commons ventured to approach his Majesty with an earnest representation, protesting against this exercise of the royal prerogative, but they took nothing by their motion (*Ib.* pp. 481-483; *Com. Jour.* v. 11, pp. 71, 74, 75).

<sup>3</sup> *Ib.* v. 11, p. 99; and see *Ib.* v. 13, p. 427; v. 14, p. 480.

<sup>4</sup> 5 & 6 Will. & Mary, c. 7, sec. 57.

<sup>5</sup> 11 & 12 Will. III. c. 2, sec. 150; 12 & 13 Will. III. c. 10, sec. 89.

<sup>6</sup> See Gen. Index, *Com. Jour.* v. 1 (i.-xvii.), p. 423.

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1698, 1699, 1704, 1705, 1709, 1710, 1711, and 1713. These measures, however, were of too sweeping a character to commend them to the favourable judgment of parliament, and they were invariably rejected, for the most part by the House of Commons itself.<sup>1</sup>

At length the majority of the House of Commons met with apparent success in carrying out their long cherished design of freeing their chamber from the presence of all dependents upon the crown, whether ministers of state or minor functionaries. In the year 1700, when the Act Amendatory of the Bill of Rights, and to provide for the succession of the crown in the person of the Princess Sophia of Hanover, and her heirs—being Protestants—was under consideration, the Commons insisted upon the insertion of a clause in the Bill, which they imagined would afford additional security for the liberty of the subject, “that no person who has an office or place of profit under the king, or receives a pension from the crown, shall be capable of serving as a member of the House of Commons.”<sup>2</sup> But this clause was only to take effect upon the accession of the house of Hanover, an event which did not take place until the year 1714. Meanwhile, the king had formed a ministry which was composed of persons who had seats in one or other of the Houses of Parliament; and the nation had begun to appreciate the advantages attending the introduction of cabinet ministers into the legislature for the purpose of explaining and defending the measures and policy of the executive government. So that before the time came when this ill-considered provision should come into operation, parliament was prepared to substitute for it a wiser and more temperate measure.

A due sense of the advantages, attending the authorized admission of the chief ministers of the crown to seats in the legislative chambers, made it no less imperative upon the House of Commons to discriminate between the introduction of those executive officers, whose presence in parliament was essential to the harmonious and effective working of the state machine, and of other office-holders, who could only serve to swell the ranks of ministerial supporters, and stifle the expression of public opinion, of which members should be the true

<sup>1</sup> *Com. Jour.* v. 1, pp. 675, 801.

<sup>2</sup> Act of Settlement, 12 & 13 Will. III. c. 2, sec. 3.

exponents. A few years' experience sufficed to point out the proper medium, and by a revision of the objectionable article in the Act of Settlement—an opportunity for which was happily afforded in the reign of Queen Anne, before the period fixed for its being enforced—parliament preserved the principle of limitation, and at the same time relaxed the preposterous stringency of its former enactment.<sup>1</sup> The new Act, passed in 1707, established for the first time, two principles of immense importance, which have since afforded an effectual security against an undue influence on the part of the crown by means of place-holders in the House of Commons. These are, first, that every member of the House accepting an office of profit from the crown, other than a higher commission in the army, shall thereby vacate his seat, but shall be capable of re-election—unless (second), the office in question be one that has been created since October 25, 1705,<sup>2</sup> or has been otherwise declared to disqualify for a seat in parliament.

Wise provisions of the statute of Anne.

The statute of Anne, however, though it checked the increase of the evil, left much to be accomplished before the House of Commons could be wholly freed from the presence of all placemen, whose services were not actually required for the purposes of parliamentary government. Some few classes of office-holders had been expressly disqualified by special enactment in this and in the previous reign; nevertheless, the number of ancient offices which were still compatible with a seat in the House of Commons continued to be excessive and unwarrantable.

In the first parliament of George I. there were 271 members holding offices or pensions; being nearly one half of the members of the then House of Commons. In the first parliament of George II. there were 257.<sup>3</sup> The reformers of that day were therefore obliged to renew their efforts to rid the House of useless officials, by whose continuance in parliament the crown was enabled to

Subsequent laws against placemen.

<sup>1</sup> The restrictive clause was repealed in 1705 by 4 Anne, c. 8, sec. 25; the new provisions, which were the result of a compromise between the two Houses, were enacted in 1707, by 6 Anne, c. 7, secs. 25, 26. See *Art. Hist.* v. 6, p. 474; Brief Remarks upon the Reform Bill, as it affects one of the royal prerogatives (London, 1831), pp. 14-16.

<sup>2</sup> 6 Anne, c. 7, secs. 25, 26.

<sup>3</sup> *Com. Pap.* 1833, v. 12, p. 1.

exercise an undue influence. Place Bills were again introduced, year after year. But the court influence was too powerful to admit of their success, and it was not until 1742 (the year of the overthrow of Walpole's administration), that an Act was passed whereby a great number of inferior officers were excluded from the House of Commons.<sup>1</sup> Further reforms in this direction were effected by various statutes passed in the reign of George III., so that in the first parliament of George IV. there were but 89 office-holders, exclusive of gentlemen holding commissions in the army or navy. Since then, the number of placemen sitting in the House of Commons has been further reduced by the abolition and consolidation of offices. In 1833, there were only 60 members holding civil offices or pensions, exclusive of 83 having naval or military commissions.<sup>2</sup> In 1847, the total number of offices of profit which might have been held at one time, by members of the House of Commons, was stated to have been only 46, and in 1867, only 43; exclusive of certain offices in the royal household occasionally conferred upon members of parliament, and which may be held in connection with a seat in the Commons, after re-election upon acceptance thereof.<sup>3</sup>

As, however, the principal offices in the administration are not "new offices" in the contemplation of the statute of Anne, and for the most part were in existence long before that enactment, the holders of them are exempted from its disqualifying operation. But whenever the exigencies of state have required the creation of additional offices—as, for example, the new secretaries of state for India, and for war, in our own day—it has been necessary to obtain the sanction of parliament to the introduction of these new officers within the walls of the House of Commons. And this sanction has been afforded, in every instance, by a statute rendering the office-holder in question eligible to be elected, and to sit and vote in the House of

<sup>1</sup> May, *Const. Hist.* v. 1, pp. 309–313; Gen. Index, *Com. Jour.* (1714–1774) verbo *Members*, xxiv.; Hearn, *Govt. of Eng.* p. 244; Act 15 Geo. II. c. 22.

<sup>2</sup> *Com. Pap.* 1833, v. 12, p. 1; and see Mr. Brougham's speech, *Parl. Deb. N.S.* v. 7, p. 1311.

<sup>3</sup> Return, in *Com. Pap.* 1867, v. 56, p. 19; and see *Ib.* 1872, v. 47, p. 31.

Commons, but not dispensing with the necessity for the re-election of a member upon his first appointment to any such office.<sup>1</sup> By requiring every member who should accept a non-disqualifying office to return to his constituents for a renewal of their suffrages, in his altered position as a minister of the crown, security is afforded against the undue influence of the crown in appointments to office. Owing to the acknowledged diminution of such influence in our own day, the necessity for this provision has become less obvious. It undoubtedly creates much delay and confusion in ministerial arrangements, without appearing to confer any equivalent advantage. But parliament, has hitherto refused to countenance the frequent attempts that have been made to procure the removal of this restriction; although they have been advocated by statesmen of the highest authority.

Hallam points out, with his usual sagacity, the evil consequences which most certainly would have attended upon the exclusion of the advisers of the crown from the House of Commons, and the immense advantages which have resulted from their immediate connection with that assembly. The only road to ministerial success is the approbation of parliament. The publicity which necessarily attends all proceedings of government, in consequence of the presence of ministers in parliament to explain or defend the conduct of public affairs, at home or abroad, is of immense advantage to the country. "The pulse of Europe beats according to the tone of our parliament; the counsels of our kings are there revealed, and, by that kind of previous sanction which it has been customary to obtain, become as it were the resolutions of a senate; and we enjoy the individual pride and dignity which belong to republicans, with the steadiness and tranquillity which the supremacy of a single person has been supposed peculiarly to bestow."<sup>2</sup> The presence of cabinet ministers in parliament has, moreover, contributed largely to enhance the importance which is properly attached to the possession of a seat in the legislature. Members of parliament excluded from office would become mere members of "a debating society, adhering to an executive;" and this is not a

Advantages of  
having  
ministers in  
parliament.

<sup>1</sup> Stats. 18 & 19 Vict. c. 10; 21 & 22 Vict. c. 106, sec. 4.

<sup>2</sup> Hallam, *Const. Hist.* v. 3, p. 259; and see Macaulay, *Hist. Eng.* v. 4, pp. 339-341; Hatsell's *Proc.* v. 2, p. 66.

position calculated to gratify a noble ambition, or to stimulate zeal for the public welfare. "A first-rate man would not care to take such a place, and would not do much if he did take it."<sup>1</sup>

These are some of the benefits which have flowed from the formal introduction of the principal servants of the crown into the two Houses of Parliament. The public officers to whom this privilege is accorded comprise not merely the cabinet ministers, but also certain other functionaries who, although not of the cabinet, preside over certain departments of the state, or serve as political secretaries in certain executive offices which require to be specially represented in parliament.

Exclusion of  
permanent  
officials.

But other subordinate offices of government are very properly excluded from the arena of political strife. The result of their exclusion is virtually to render their tenure of office that of good behaviour. And in the permanent officers of the crown the state possesses "a valuable body of servants who remain unchanged while cabinet after cabinet is formed and dissolved; who instruct every successive minister in his duties, and with whom it is the most sacred point of honour to give true information, sincere advice, and strenuous assistance to their superior for the time being. To the experience, the ability, and the fidelity of this class of men is to be attributed the ease and safety with which the direction of affairs has been many times, within our own memory, transferred from Tories to Whigs, and from Whigs to Tories."<sup>2</sup>

In narrating the circumstances in which the ministers of the crown first obtained a legal right to sit in parliament, we have somewhat anticipated the order of events, and must now revert to the history of the cabinet during the reign of William III.

It was in the year 1693 that the king began to effect the important change in the status of the Cabinet Council which inaugurates a new era in the history of the English monarchy. By the advice of Sunderland, the king was induced to abandon his neutral position between the contending parties in the state, and to entrust his administration to the Whigs, who were at that time the strongest party in parliament. Protracted negotiations were required before

Reign of  
William III.

<sup>1</sup> Bagehot, *Eng. Const.* p. 31.

<sup>2</sup> Macaulay, v. 4, p. 339.



this arrangement could be fully carried out, and it was not until the following year that the new ministry, <sup>His first Whig ministry.</sup> formed upon the basis of party, was complete.<sup>1</sup> Even then, although the cabinet was mainly composed of Whigs, it was not exclusively so. The king was cautious, and still tried to share his favours between the two contending parties. Two more years elapsed before the last Tory was removed from the council-board, and a purely Whig ministry existed.<sup>2</sup>

Having at length succeeded in obtaining exclusive possession of the king's counsels, the Whigs devoted themselves to the work of instituting and maintaining discipline in their ranks, by the frequent assembling together of their friends and supporters in the House of Commons. Some of these meetings were numerous, others more select; but they formed the origin of a system of party organization never before resorted to, but which has since been adopted and matured by every influential section in both Houses of Parliament.<sup>3</sup>

The first parliamentary ministry of King William was of brief duration. At the outset it was eminently successful in conciliating the goodwill of the House of Commons: but a general election made great changes, and it was soon apparent that the new House was not willing to co-operate with the existing administration.<sup>4</sup> Montague, who filled the important offices of first lord of the treasury and chancellor of the exchequer, became personally unpopular, and was violently assailed by his opponents in parliament. According to our present theory of government, he should have resigned his office, and given place to the chiefs of the opposition. Out of office, the men who had become so obnoxious to the House might have succeeded, by good statesmanship, in recovering its favour, and ere long have been summoned to resume their places. "But these lessons, the fruits of the experience of five generations, had never been taught to the politicians of the seventeenth century. Notions <sup>His subsequent administrations.</sup> imbibed before the revolution still kept possession of the public mind. Not even Somers, the foremost man of his age in civil wisdom, thought it strange that one party should be in possession of the executive administration while

<sup>1</sup> Macaulay, v. 4, pp. 438-467, 506.

<sup>2</sup> *Ib.* p. 734.

<sup>3</sup> *Ib.* p. 732.

<sup>4</sup> See *Ib.* v. 5, p. 123.



the other predominated in the legislature. Thus, from the beginning of 1699 till the general election of 1705, the harmony, which had been temporarily established between the servants of the crown and the representatives of the people, ceased. No portion of our parliamentary history is less pleasing or more instructive. Deprived of the constitutional control afforded by the presence of ministers of the crown, in whom they were willing to confide, the painful scenes of the earlier years of this reign were re-enacted, and again "the House of Commons become altogether ungovernable; abused its gigantic power with unjust and insolent caprice, browbeat king and lords, the courts of common law and the constituent bodies, violated rights guaranteed by the Great Charter, and at length made itself so odious that the people were glad to take shelter under the protection of the throne and of the hereditary aristocracy, from the tyranny of the assembly which had been chosen by themselves."<sup>1</sup>

In fact, with all his penetration, the king failed to perceive that the true remedy for these evils lay in the formation of an entirely new ministry possessed of the confidence of that parliamentary majority which he had found to be so unmanageable. He contented himself with making some minor changes; and, with a view to conciliate the opposition, selected his new appointments from the Tory ranks. "But the device proved unsuccessful; and it soon appeared that the old practice of filling the chief offices of state with men taken from various parties, and hostile to one another, or at least unconnected with one another, was altogether unsuited to the new state of affairs; and that, since the Commons had become possessed of supreme power, the only way to prevent them from abusing that power with boundless folly and violence, was to entrust the government to a ministry which enjoyed their confidence."<sup>2</sup>

In 1702 William III. closed his eventful career, and was succeeded by Anne, during the greater part of whose reign conflicts, of more or less intensity, prevailed between the Whigs and the Jacobites, both in and out of parliament.

As yet no better system of government existed than that afforded by a ministry who, although they had seats in parlia-

<sup>1</sup> Macaulay, v. 5, p. 168.

<sup>2</sup> *Ib.* pp. 184-187.

ment, were neither necessarily united amongst themselves, nor in harmony with the predominant political party in the legislature. Thus far the lessons of wisdom, taught by the experience of the preceding reign, had not been duly appreciated by succeeding statesmen. As a natural consequence, the queen's ministers were unable, at first, to control the legislature. But after awhile, the splendid successes of Marlborough in the Netherlands, in the campaigns of 1705 and 1706, gave strength to the government, and restored their supremacy. Thenceforward, the usual changes occurred in successive administrations, each party preponderating in turn, and then having to give place to their rivals. But no events took place during this reign of material importance in the history of parliamentary government,<sup>1</sup> with the exception of the formal repeal of the ill-advised provisions in the Act of Settlement in regard to the privy council, and the disqualification of office-holders elected to parliament, which, had they ever come into operation, would have hindered the development of cabinet governments, and have excluded the queen's ministers, in common with other placemen, from a seat in the House of Commons.<sup>2</sup> Shortly afterwards, as we have seen,<sup>3</sup> a new Place Bill was enacted, which expressly sanctioned their presence in parliament, thereby affixing the seal of legislative approval to the new constitutional system, and establishing it upon a firm and unimpeachable basis.

It is in this reign, in the year 1711, that we first meet with a positive declaration, in a debate in the House of Lords, that the sovereign ought not to be held personally responsible for acts of government, but that, "according to the fundamental constitution of this kingdom, the ministers are accountable for all."<sup>4</sup> Furthermore, that there is no prerogative of the crown that may be exempted from parliamentary criticism and advice.<sup>5</sup>

Complete acknowledgment of ministerial responsibility.

<sup>1</sup> [Mr. Todd lays insufficient stress in this passage on the history of the reign of Anne. The gradual transformation of the Godolphin ministry from a Tory to a Whig administration, *i.e.* from an administration appointed by the crown to an administration reflecting the views of the House of Commons, is a striking proof of the transition which was being effected from government by prerogative to parliamentary government. See *Edin. Rev.* No. 346, p. 318.—*Editor.*]

<sup>2</sup> 4 Anne, c. 8, secs. 24, 25.

<sup>3</sup> See *ante*, p. 245.

<sup>4</sup> *Parl. Hist.* v. 6, p. 972; Hearn, *Eng. Govt.* p. 135.

<sup>5</sup> *Parl. Hist.* v. 6, p. 1038.

But, in the exercise of their acknowledged freedom of debate upon the conduct of the administration, there was some difficulty at first as to the phraseology to be employed in parliament to designate the queen's advisers. Thus, on the occasion above mentioned, a discussion arose as to the propriety of using the term "cabinet council" in an address to the queen. Through inadvertence this expression had been embodied in a formal motion; but it was afterwards objected to, as being "a word unknown in our law." In the course of the debate, Lord Peterborough told the House that he had heard the privy council defined as a body "who were thought to know everything and knew nothing," and the cabinet as those "who thought nobody knew anything but themselves."<sup>1</sup>

More than half a century afterwards, in the elaborate treatises of Blackstone and De Lolme upon the British constitution, the existence of the cabinet was entirely ignored, and no writer has hitherto attempted to trace the rise and progress of this institution, and to explain, in detail, its formation and functions.<sup>2</sup>

<sup>1</sup> *Parl. Hist.* v. 6, p. 974; and see Knight, *Hist. of Eng.* v. 5, p. 168.

<sup>2</sup> See Macaulay, *Hist. of Eng.* v. 4, pp. 535, 437. It is also very remarkable that in none of the writings of the statesmen, who framed the constitution of the United States, is there any indication that they were acquainted with the position then occupied by the English cabinet (Hearn, *Govt. of Eng.* p. 196; and see *Int. Rev.* March, 1877, p. 242).

## CHAPTER II.

## THE LATER HISTORY OF THE CABINET.

IN entering upon this branch of our subject, it will be profitable to inquire more particularly into the origin and working of three cardinal principles of parliamentary government, to which—taken in connection with the authoritative introduction of ministers into the legislature—we owe its present organization and efficiency. These are (1) the rule (already partially considered) which requires political unanimity in the cabinet; (2) the practice of simultaneous changes of the whole cabinet, as a result of its dependence upon parliamentary majorities; (3) the office of prime minister, as a means of perfecting the machinery of administration, and of ensuring the carrying out of a policy that shall be acceptable alike to the sovereign and to parliament.

Cardinal  
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(1) The rule requiring political unanimity in the cabinet is the result of the changes traced in the preceding chapter. William III., as we have seen, was convinced of the advantages resulting from a bond of political agreement between the members of his cabinet, and formed his ministry in 1695 on this basis. A partial attempt was made by the House of Commons, in 1698, to hold all the leading ministers responsible for advising the obnoxious partition treaties.<sup>1</sup> But the value of the principle was not sufficiently appreciated either by the statesmen of that period or by the king himself. In the various changes which ensued in the composition of the ministry during the remainder of this reign, it was lost sight of, and men of opposite parties were included in the same cabinet. So long as the king was regarded as paramount in the government, and his views as those which should always prevail in council, this discordance

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the cabinet.

<sup>1</sup> See *ante*, p. 54; *Parl. Deb.* v. 6, p. 327.

of opinion was comparatively unimportant. But, in proportion as the dogma of the royal impersonality began to prevail, and the power of the cabinet to increase, the necessity for political agreement amongst the ministers of the crown became more obvious and indisputable.

The ministries appointed by Queen Anne, however, exhibited the same want of agreement apparent in the later ministries of William III. Upon her accession, in 1702, her Majesty, whose personal inclinations were in favour of Tory principles, lost no time in forming a new ministry, consisting for the most part of Tories, that continued in office until 1705, when it underwent extensive changes, which gave the predominance to the Whigs.<sup>1</sup> In 1707, the cabinet was again partially remodelled, and rendered still more Whiggish, Mr. Secretary Harley being the only Tory of note who was permitted to remain. But, in the following year, Harley himself was removed, for endeavouring "to set up for himself, and to act no longer under the direction of the lord treasurer." Soon afterwards the Earl of Pembroke retired, and the veteran Whig, Lord Somers, was recalled to office, so that at length the ministry consisted entirely of Whigs.<sup>2</sup> But about this time, through the influence of Dr. Sacheverell, Tory principles began to get the ascendancy throughout England, whereupon the queen took occasion, in 1710, to dismiss her ministry and entrust the formation of another to Harley, the acknowledged leader of the Tory party. Harley, at first, attempted a coalition with the Whigs, but, not succeeding, he obtained the queen's consent to a dissolution of parliament, there being evident tokens that the existing Whig House of Commons would probably be replaced by one of opposite politics. This anticipation proved correct, and Harley had therefore no difficulty in forming a cabinet composed exclusively of Tories.<sup>3</sup>

But even then political union was not obtained. Harley was a dissenter, strongly inclined to toleration, and suspected of Hanoverian proclivities. His principal colleague, Bolingbroke, on the contrary, favoured the Jacobites, and was no friend either to Whiggery or dissent. This occasioned frequent disagreements, and even personal altercations in the council chamber, and in the

Discord in  
Queen Anne's  
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<sup>1</sup> Stanhope, *Queen Anne*, pp. 176, 204.

<sup>2</sup> *Ib.* pp. 325, 335, 366, 372, 403.

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royal presence. Moreover, the other members of the cabinet were divided in their political sentiments, some being attached to the Protestant succession, and others partial to the Pretender.<sup>1</sup>

This want of concord amongst ministers upon questions of vital import was more and more apparent as the end of the queen's life drew nigh. Each party calculated eagerly upon the chances of that event, hoping to secure for themselves the supremacy. When the queen lay upon her death-bed Bolingbroke's influence was uppermost, and he managed to get the queen's authority to form a new administration. His plans were suddenly frustrated by an event which is quite unique in our parliamentary history, and which is worthy of notice, not merely as illustrating the evil effects of divided counsels, but also as exemplifying a state of things that could only have arisen in the infancy of parliamentary institutions.

Bolingbroke was steadily engaged in the work of constructing his ministry, and had already filled up most of the principal offices with men of the Jacobite <sup>Bolingbroke</sup> ministry. party. He had ulterior designs in view of favouring the claims of the Pretender to succeed to the throne upon the demise of the queen. Knowing her precarious state, he caused a council to be summoned for June 30, 1714. When that day arrived the council assembled at Kensington, the high officers of state, already appointed thereon, alone being present. Lord Mahon gives the following graphic account of the meeting: "The news of the queen's desperate condition had just been received. The Jacobites sat dispirited, but not hopeless, nor without resources. Suddenly the doors were thrown open, and Argyle and Somerset (who were members of the privy council, though not of the cabinet) were announced. They said that, understanding the danger of the queen, they had hastened, though not specially summoned, to offer their assistance. In the pause of surprise which ensued, Shrewsbury rose and thanked them for their offer." (This nobleman, it appears, was in reality a Whig, but he had succeeded in deceiving Bolingbroke, who had fully relied upon his fidelity, and had bestowed upon him the offices of lord chamberlain and lord lieutenant of Ireland, while he was actually concerting in secret measures with the two Whig peers, the Dukes of Argyle

<sup>1</sup> Mahon, *Hist. of Eng.* v. 1, pp. 44, 45.



and Somerset, whose unexpected appearance at the council filled the cabinet conspirators with dismay.) "They, immediately taking their seats, proposed an examination of the physicians; and on their report suggested that the post of lord treasurer (which Bolingbroke had intended to put into commission) should be filled without delay, and that the Duke of Shrewsbury should be recommended to her Majesty." "The Jacobite ministers, thus taken completely by surprise, did not venture to offer any opposition to the recommendation, and accordingly a deputation, comprising Shrewsbury himself, waited upon her Majesty the same morning, to lay before her what seemed to be the unanimous opinion of the council. The queen, who by this time had been roused to some degree of consciousness, faintly acquiesced, delivered the treasurer's staff to Shrewsbury, and bade him use it for the good of her people. The duke would have returned his staff as chamberlain, but she desired him to keep them both; and thus by a remarkable, and I believe unparalleled combination, he was invested for some days with three of the highest offices of court and state, being at once lord treasurer, lord chamberlain, and lord-lieutenant of Ireland." "Another proposal of the Dukes of Somerset and Argyle, which had passed at the morning meeting, was to send immediately a special summons to all privy councillors in or near London. Many of the Whigs accordingly attended the same afternoon, and amongst them the illustrious Somers. . . . His great name was in itself a tower of strength to his party; and the council, with this new infusion of healthy blood in its veins, forthwith took vigorous measures to secure the legal order of succession."<sup>1</sup> Thus ends the narrative of this startling and successful *coup d'état*.

Circumstances favoured the daring statesman by whom it was accomplished. The next day the queen sank back into a lethargy, and died on the following morning. Nothing but a consideration of the eminence of the peril encompassing the state, and of the necessity for prompt and decided action, could have warranted such a high-handed proceeding; for then, as now, the meetings of council were open to those councillors only who had been specially summoned in the name of the sovereign to attend. With a monarch in posses-

<sup>1</sup> Mahon's *Hist. of Eng.* v. 1, pp. 133, 144.

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sion of his proper faculties, such an event could not happen; for a privy councillor may be struck off the list at the royal discretion, so that, even if one were to venture upon attending a council meeting without a summons, he would subject himself to the risk of instant dismissal, upon an appeal of the prime minister to the sovereign.

Divisions in the cabinet, from the want of a recognition of the principle of political unity, continued to exist during the administrations which followed upon the accession of the house of Hanover, save only when Robert Walpole was chief minister. Continued divisions in the cabinet. Owing to his extraordinary talents, thorough familiarity with the details of office, and skill in the art of governing men, Walpole succeeded in engrossing the supreme direction of affairs. For twenty years his control in the cabinet was unlimited and undeniable. But when, in 1742, he was compelled to retire from office, there ceased to be any political agreement amongst the ministers of the crown. The ministry was reconstructed on a Whig basis; but ere long the Tory party were gratified by receiving a share of the ministerial offices, and so the new administration was founded upon "the broad bottom" of both parties.<sup>1</sup> In 1763, upon the retirement of Lord Bute, the elder Pitt was sent for by the king, but he refused to form a ministry unless there was almost a complete change of men in the ministerial offices, declaring "that, if his majesty thought fit to make use of such a little knife as himself, he must not blunt the edge; and that he and his friends could never come into government but as a party." The king refused to give up those who had served him faithfully, and thus the negotiation came to an end, Mr. Grenville being entrusted with the formation of a ministry, the composition of which was amicably arranged between himself and the king.<sup>2</sup>

The lack of a common bond of union amongst the ministers of the crown at this period, and the continued Lack of a bond of union. interference of the king with the proposed arrangements for the construction of ministries, naturally resulted in a series of weak and vacillating administrations. Moreover, it was no uncommon thing, at this time, to see colleagues in office opposing one another in parliament upon measures that

<sup>1</sup> Mahon, *Hist. of Eng.* v. 3, pp. 161-169, 198.  
<sup>2</sup> *Grenville Papers*, v. 2, pp. 104-106, 198.

ought to have been supported by a united cabinet.<sup>1</sup> This defective system continued in operation during the first twenty years of the reign of George III., and until the rise of the second William Pitt.<sup>2</sup> For the long continuance of practices, so entirely opposed to the principles of constitutional government, the king himself must be regarded as mainly accountable. In his love of power, and anxiety to carry out his peculiar ideas of government, he had formed a party of his own which was known as "the king's friends," with whose aid he endeavoured to influence the course of legislation, irrespective of his responsible advisers, if the measures they proposed were at all at variance with his private convictions. Many of "the king's friends," who held offices in the state or household, looked to the king and not to his ministers for instructions; and, accordingly, not unfrequently opposed the ministerial measures in their progress through parliament. But after Mr. Pitt became premier, in 1783, this objectionable practice was discontinued. In general, the king placed entire confidence in Mr. Pitt,<sup>3</sup> and yielded to his advice in state affairs, save only in regard to certain questions, which he would not permit to be entertained. Pitt's supremacy in the councils of his sovereign, as well as in parliament, was undisputed by his colleagues, and continued unimpaired until his death. After that event, and during the existence of the Grenville ministry, the king for a short time, in 1807, renewed his interference with the policy of his constitutional advisers, threatening them with the opposition of his "friends" in parliament, if they continued to support Roman Catholic claims. But on the dismissal of this ministry a Tory Cabinet was again formed, under the Duke of Portland, and afterwards Mr. Perceval, to which the king gave an unqualified support.

In 1812, during the regency, an attempt was made to form a ministry, consisting of men of opposite political principles,

<sup>1</sup> Hearn, *Govt. of Eng.* pp. 198, 199; Cox, *Inst.* 253; Knight's *Hist. of Eng.* v. 6, pp. 140, 200.

<sup>2</sup> *Ib.* pp. 303, 434, 439; Mahon, *Hist. of Eng.* v. 7, p. 213; Adolphus, *George III.* v. 3, p. 349; Donne, *Corresp. George III.* v. 1, p. 212; Hearn, *Govt. of Eng.* p. 195.

<sup>3</sup> Early in 1792, however, the king made overtures to Lord Lansdowne, to learn his views as to the expediency of a change of ministry; but the negotiations came to nothing (Fitzmaurice, *Life of Ld. Shelburne*, v. 3, p. 500).

who were invited to accept office, not avowedly as a coalition government, but with an offer to the Whig leaders that their friends should be allowed a majority of one in the cabinet. This offer, though declared at the time to be not "a very unusual thing," was declined on the plea that to construct a cabinet on "a system of counter-action was inconsistent with the prosecution of any uniform and beneficial course of policy."<sup>1</sup>

Political  
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From henceforth this was an admitted political maxim, and all cabinets are now constructed upon some basis of political union, agreed upon by the members composing the same when they accept office together. It is also distinctly understood that, so long as the different members of a cabinet continue in the ministry, they are jointly and severally responsible for each other's acts, and that any attempt to separate between a particular minister and the rest of his colleagues in such matters would be unconstitutional and unfair.<sup>2</sup> The existing usage in this respect will receive a fuller explanation when we come to consider the duties of the administration in connection with parliament.

(2) The practice of simultaneous changes of the whole cabinet, as a result of its dependence upon the approbation of the House of Commons was unknown upon the first establishment of parliamentary government. During the reign of William III. changes in the ministry were usually gradual, and were occasioned partly by the personal feelings of the king, and partly by considerations of the relative strength of parties in parliament. From the revolution until the reign of George I., there is no instance of the simultaneous dismissal of a whole ministry, and their replacement by another.<sup>3</sup> The first example of this kind occurs in the time of George I., who immediately upon his accession to the throne effected a total change in all the principal offices of state. But this alteration took place on account of personal objections entertained by the king to the

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<sup>1</sup> Stapleton's *Canning and his Times*, p. 201; *Parl. Deb.* v. 23, pp. 428, 550.

<sup>2</sup> Lord Palmerston, *Hans. D.* v. 173, p. 1920; *Ib.* v. 176, p. 1272; and see Grey, *Parl. Govt.* new ed. pp. 51-58; *Quar. Rev.* v. 123, p. 544; Ashley, *Life of Ld. Palmerston*, v. 2, p. 329.

<sup>3</sup> Cox, *Inst.* pp. 247, 251.

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The first instance on record of the resignation of a prime minister in deference to an adverse vote of the House of Commons is that of Sir Robert Walpole.<sup>1</sup> The career of this statesman is remarkable, as he affords in his own person the first example of elevation to the rank of first minister of the crown, and of subsequent deprivation of office, without reference to the personal wishes of the sovereign, but through the influence of the dominant party in the House of Commons.

The advent of Lord Rockingham's ministry to power, in 1782, is noticeable as being the first instance of the simultaneous change of the whole administration, in deference altogether to the opinions of the House of Commons. The ministry of Lord North, after an existence of twelve years, began to be regarded with disfavour in that House. A direct vote of want of confidence had indeed been negatived, but only by a majority of nine. A similar motion was about to be offered, when it was evident that the defeat of the ministry could not be averted. Accordingly, on March 20, 1782, the very day when the new motion, to declare that the House had lost confidence in his Majesty's advisers, was to be brought forward, Lord North was commissioned to inform the House that his administration was at an end. Seven days afterwards the king wrote to Lord North, "At length the fatal day is come, which the misfortunes of the times, and the sudden change of sentiments in the House of Commons, have driven me to, of changing my ministers, and a more general removal of other persons, than I believe was ever known before." Excepting that Lord Thurlow still remained as "the king's chancellor," the change of administration was total, a thing previously unprecedented.<sup>2</sup>

Thenceforward, the existence of a ministry has always depended upon its ability to retain the goodwill or confidence of parliament; and, when a change of ministry has occurred, it has invariably been simultaneous and complete. If any individual ministers have remained in office, upon the formal retirement of a

Since then  
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<sup>1</sup> Cox, *Inst.* p. 249.

<sup>2</sup> Knight's *Hist. of Eng.* v. 6, p. 435; Cox, *Inst. Eng. Govt.* p. 251.



cabinet, they have been obliged to make a fresh agreement with the incoming premier, ere they could form part of the new administration. The precise circumstances in which resignations of office become constitutionally necessary, will be hereafter considered.

(3) Our remarks on the origin and development of the office of prime minister will be suitably prefaced by a brief description of the interior condition of the cabinet council at the precise stage in its history at which we have now arrived.

Internal condition of the cabinet before the reign of George III.

At the period of the accession of the House of Hanover, parliamentary government may be considered as fully established.<sup>1</sup> Nevertheless, the new system was still in its infancy, and exhibited all the marks of immaturity. The cabinet itself was frequently the scene of internal dissensions, which naturally tended to weaken its influence; and, until this grave defect could be overcome, it was impossible that its legitimate authority could be properly exercised.

From the first introduction of an interior or "cabinet" council, in the reign of Charles II., until the time of Queen Anne, all deliberations therein upon affairs of state were conducted in the presence of the sovereign.<sup>2</sup>

Deliberation in presence of the sovereign.

No doubt, during the frequent absences from the kingdom of William III., the ministers of the crown were permitted to meet and confer together on political questions, in an informal way. But the right of the king to be present at all such consultations was never disputed. It was Queen Anne's regular practice to preside at weekly cabinet councils, at which all public business, foreign and domestic, was debated and determined upon.<sup>3</sup> It was only upon the accession of George I., who was incapable of speaking our language, that it became customary for ministers to hold cabinet meetings by themselves, and to communicate the result of their discussions to the king by means of a leading member of the cabinet, or some particular minister, whose department might be affected by the matter in hand.<sup>4</sup> By the end of George II.'s reign it had become "unusual" for the sovereign to be present at consultations of the cabinet. But we find an instance of the

<sup>1</sup> Hallam, *Const. Hist.* v. 3, p. 390.

<sup>2</sup> See *ante*, pp. 225-227.

<sup>3</sup> Campbell, *Chan.* v. 4, p. 287.

<sup>4</sup> Hallam, v. 3, p. 388.



practice soon after the accession of George III.<sup>1</sup> Since that period, however, the absence of the sovereign from cabinet Councils has become an established usage of the constitution.<sup>2</sup>

Meanwhile, ministers had gradually acquired the habit of meeting together, at stated intervals, usually at the house of the principal minister, to hold private conferences upon state affairs. Thus, in Queen Anne's reign, Dean Swift mentions that Mr. Harley, then the head of the administration, used to invite four or five of the leading ministers to dine with him every Saturday, and, "after dinner, they used to discourse and settle matters of great importance." These meetings were not, however, always strictly confined to members of the administration, for the dean himself was frequently invited to join them.<sup>3</sup> In the reign of George II. it would appear from Lord Hervey that the cabinet meetings were held irregularly, and at no fixed times. Walpole, when first minister (1721-42), met the whole cabinet as seldom as possible, but often invited two or three of his colleagues to dinner, to talk over matters of business, and assist him in shaping his intended policy, the which for the most part he kept in his own hands.<sup>4</sup> And afterwards, during the Grenville administration (1763-65), weekly "cabinet dinners" were again resorted to, as affording a convenient opportunity for mutual concert amongst ministers. These convivial assemblies were ordinarily attended only by the lord chancellor, the president of the council, the first lord of the treasury, and the two secretaries of state. But when important matters were to be discussed, requiring the advice of other ministers, having special acquaintance with the particular subject, or ability to give counsel thereupon, such were invited to be present.<sup>5</sup>

As regards the individuals who, at this time, were usually included in the cabinet, and their relative weight and importance therein, we have no very precise information, although incidental notices in contemporary writers furnish some curious particulars. Thus,

Ministers with  
seats in the  
cabinet.

<sup>1</sup> Waldegrave's *Memoirs*, p. 66; Harris, *Life of Hardwicke*, v. 3, p. 231.

<sup>2</sup> Campbell, *Chan.* v. 3, p. 191 n.; Hearn, *Govt. of Eng.* p. 190; Gladstone, in *Church Quar. Rev.* v. 3, p. 479.

<sup>3</sup> Campbell, *Chan.* v. 4, p. 450 n.

<sup>4</sup> *Ib.* pp. 607, 608; Lord Hervey's *Memoirs*, by Croker, v. 2, p. 551.

<sup>5</sup> Massey, *Reign of Geo. III.* v. 1, pp. 277, 328.

William III. is said to have appointed the Marquis of Normanby, as a mark of favour and distinction, to a seat in the "cabinet council," and yet to have "never consulted" him; and Sir John Trenchard, who was secretary of state from 1692 to 1695, "though he bore the title and drew the salary," "was not trusted with any of the graver secrets of state," and was "little more than a superintendent of police."<sup>1</sup> Marlborough was a member of the first cabinet of George I., holding at the same time the office of commander-in-chief, and yet he was "scarcely ever invited to the cabinet, of which he nominally formed a part, and was confined to the most ordinary routine of his official functions," being unable to "obtain even a lieutenancy for a friend."<sup>2</sup> In the reign of George II. we learn that the great officers of the household—*e.g.* the lord steward, the lord chamberlain, the master of the horse, and the groom of the stole, together with the archbishop of Canterbury, and the lord lieutenant of Ireland—were always included in what was called the cabinet, but that there was an "interior council," consisting of Walpole, who was virtually prime minister, the chancellor, and the two secretaries of state, who in the first instance consulted together on the more confidential points.<sup>3</sup> The testimony of Hervey on this point may be relied upon, as he himself held the office of privy seal, with a seat in the cabinet. The facts stated are further corroborated by the papers of Lord Chancellor Hardwicke, who occupied a very conspicuous position as a minister in this reign. These papers prove, moreover, that the then archbishop of Canterbury took a very active part in politics, as a member of the cabinet.<sup>4</sup> It does not appear that the chancellor of the exchequer, an officer who is now of the first importance in every administration, was usually a member of the cabinet at this time. When Mr. Dowdeswell accepted this office, in 1765, we find a doubt expressed in contemporary correspondence whether he would have a seat in the cabinet council.<sup>5</sup>

<sup>1</sup> Macaulay, v. 4, pp. 373, 506; Haydn, *Book of Dignities*, p. 172.

<sup>2</sup> Mahon, *Hist of Eng.* v. 1, p. 153.

<sup>3</sup> Lord Hervey's *Memoirs of George II.* edited by Croker, v. 2, p. 551.

<sup>4</sup> Harris, *Life of Hardwicke*, v. 1, p. 383; v. 2, pp. 111, 415; v. 3, p. 453.

<sup>5</sup> Memoir of Dowdeswell, in *Cavendish Debates*, v. 1, p. 576.

So lately as in 1782, under the Shelburne administration, there appear to have been different gradations of power within the cabinet. They were thus quaintly described by Lord Shelburne himself, in conversation with Jeremy Bentham. First, the cabinet simply, including those who were admitted to that honourable board, but without possessing substantial authority. Next, the cabinet with *the circulation*, that is, with the privilege of a key to the cabinet boxes, wherein the foreign despatches and other papers are sent round for the perusal of ministers; and, highest of all, the cabinet with the circulation and the *Post Office*, in other words, the power of ordering the letters of individuals to be opened at the Post Office, a right which technically belongs only to a secretary of state, and would naturally be limited to the personages of the greatest weight and influence in the administration.<sup>1</sup> And of the younger Pitt it was said that at the cabinets during his two ministries he used briefly to discuss with Dundas whatever business they had not previously settled together, then inform his colleagues of his decision and tell them they might go.<sup>2</sup>

From all these particulars it is evident that the cabinet was, during this period, in a transition state, and was very far from exhibiting the homogeneity it now presents. In fact, for the first century after the revolution, very little of the order and subordination which has been since established throughout the administration, from the highest to the lowest offices, was in existence. Government was principally carried on by means of the separate departments of state, each independent of the other, and subject only to the general superintendence of the crown.<sup>3</sup> No provision was made for regular concert between the ministers; nor was it even necessary that the head of a department should inform his colleagues, either individually or collectively, of the measures he proposed to take. The consequence was that differences of opinion between members of the administration, which should have been accommodated in the closet, were often disclosed for the first time in the presence of parliament. Periodical cabinet councils, for the purpose of deliberating upon affairs of state, were unknown.

<sup>1</sup> Bentham's Works, v. 9, p. 218 n.

<sup>2</sup> Fitzmaurice, *Life of Lord Shelburne*, v. 3, p. 411.

<sup>3</sup> Macaulay, *Hist. of Eng.* v. 3, p. 14; *Quar. Rev.* v. 138, p. 418.

The defective condition of the cabinet during this period is chiefly attributable to the fact that, as a general rule, it did not recognize the supremacy of any common chief. No doubt it has always happened that men of strong character, and gifted with the capacity for rule, have taken the lead amongst their fellows. Thus, as we shall have occasion presently to notice, Sir Robert Walpole, who was chief minister under the first two Georges, was able during the greater part of his long administration to keep his colleagues completely in check. His extraordinary ability, and unrivalled parliamentary influence, naturally gave him a controlling power in the cabinet. But his was an exceptional case. It was not until the accession to office of the younger Pitt, in 1783, that the paramount authority of a prime minister over his associates in the government was unreservedly confessed; and that as a natural consequence government by departments came to an end.<sup>1</sup>

Lack of a  
supreme head.

Great as have been the changes, since the revolution, in the authority of the cabinet council as a body, the altered position of the first minister has been peculiarly remarkable. From a very early period of English history we find mention made of a functionary of this description. But there is an obvious distinction between the prime minister of a monarch under prerogative government and the premier of a modern cabinet. The one was simply known as the king's favourite, whose rise and fall depended solely upon his retaining the goodwill of his royal master, while the other is the acknowledged head of a responsible administration, whose tenure of office mainly depends upon his ability to obtain parliamentary support. Bearing in mind this distinction, we have a clue to the variation which has taken place in public opinion with regard to this office.

Early notices  
of a prime  
minister.

Clarendon asserts that nothing was so hateful to Englishmen, in his day, as a prime minister. They would rather, he said, be subject to a usurper, like Oliver Cromwell, who was first magistrate in fact as well as in name, than to a legitimate king who referred them to a grand vizier.<sup>2</sup> During the reign of William III. there was usually a "chief adviser of the crown," on matters relating to the internal administration, and

<sup>1</sup> See *post*, p. 277.

<sup>2</sup> See Macaulay, *Hist. of Eng.* v. 3, p. 13.

to the management of the two Houses of Parliament; but this functionary was not necessarily the first minister *virtute officii*. The king himself was the actual head of his own ministries, and the sole bond of union amongst the members composing the same,<sup>1</sup> and it was only as the idea of personal government on the part of the king faded and vanished away, that the office of first minister seems to have obtained regular recognition. So recently as 1741,<sup>2</sup> we find Sir Robert Walpole resenting the title of prime minister as an imputation.<sup>3</sup> And yet it was in his person, though not until he had been for a considerable time first lord of the treasury, that this office first began to assume importance,<sup>4</sup> and, in several minor points, the features of our modern political system began to show themselves during his career.<sup>5</sup>

Walpole was first lord of the treasury from 1715 to 1717, and afterwards from 1721 to 1742. It was under his administration that the government of this country began to be conducted with direct reference to the prevailing opinions in the House of Commons. He was the first prime minister who sat in that House, and although, as yet, there was no established rule requiring unanimity in the cabinet and obliging all the ministers to concur in advocating every ministerial measure in parliament, nevertheless he was the first to recognize the principle that there should be an agreement amongst the servants of the crown in parliament in support of the policy of the government.

Lord Campbell describes Walpole as having been probably the most dexterous party leader we have ever had —equally skilled to win royal favour, to govern the House of Commons, and to influence or be influenced by public opinion. He was just the man for the times, which called for a statesman of peculiar discretion and common sense to conduct the nation safely over the critical period of

<sup>1</sup> See Macaulay, *Hist. of Eng.* v. 3, pp. 13, 538; v. 4, p. 443.

<sup>2</sup> Mr. Gladstone, in *Ch. Quar. Rev.* v. 3, p. 479.

<sup>3</sup> *Parl. Hist.* v. 9, p. 1287 n.

<sup>4</sup> Macaulay's *Biographies*, p. 231.

<sup>5</sup> See *Lord Shelburne's Life*, v. 1, p. 42; *Sir R. Walpole*, a political biography by A. C. Ewald; and a clever sketch of the character and career of Walpole, in Mrs. Oliphant's *Reign of Geo. II.* v. 1, p. 73.



the establishment of a new dynasty, and the consolidation of a new political system. In proof of this we may be excused for quoting Carlyle's quaint remarks upon Walpole, though they are neither flattering nor altogether just. Incidentally referring to him, in his *Life of Frederick of Prussia*, he says, "For above ten years, for almost twenty years, virtually and through others, he has what they called 'governed' England; that is to say, has adjusted the conflicting parliamentary chaos into counterpoise, by what methods he had; and allowed England, with Walpole atop, to jumble whither it would and could. Of crooked things made straight by Walpole, of heroic performances or intention, legislative or administrative, by Walpole, nobody ever heard; never of the least hand-breadth gained from the Night-Realm in England, on Walpole's part: enough if he could manage to keep the Parish Constable walking, and himself afloat atop. . . . This task Walpole did—in a sturdy, deep-bellied, long headed, John Bull fashion, not unworthy of recognition." "He had one rule, that stood in place of many: To keep out of every business which it was possible for human wisdom to stave aside. 'What good will you get of going into that? Parliamentary criticism, argument, and botheration! Leave well alone. And even leave ill alone: are you the tradesmen to tinker leaky vessels in England? You will not want for work. Mind your pudding, and say little!' At home and abroad, that was the safe secret." "In this manner, Walpole, by solid John Bull faculty (and methods of his own), had balanced the parliamentary swaggings and clashings, for a great while; and England had jumbled whither it could, always in a stupid, but also in a peaceable manner."<sup>1</sup>

Much has been said in regard to the corruption displayed by Sir Robert Walpole in his dealings with parliament. But the charges against him on this score were greatly exaggerated;<sup>2</sup> and, although bribery is undoubtedly a crying evil, it was not peculiar to his age. The parliaments that preceded the revolution were notoriously

Walpole's  
alleged  
corruption.

<sup>1</sup> Carlyle's *Frederic the Great*, v. 3, pp. 373, 374. This reminds us of Lord Melbourne, who, when any hazardous or difficult question was propounded by his colleagues, used to say, "Can't you let it alone?" And "Whenever you are in doubt what should be done, do nothing" (Torrens, *Life of Melbourne*, v. 1, p. 391).

<sup>2</sup> Ewald, *Life of Walpole*, pp. 437, 445, 457; Pike, *Hist. of Crime in Eng.* v. 2, p. 312.

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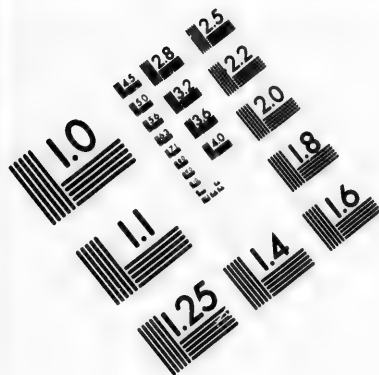
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open to the influence of bribery, and more or less, in one form or another, it would seem that this vice is well-nigh inseparable from popular institutions.<sup>1</sup> A keener sense of personal honour, and a higher tone of public morality has, in our own day, freed our legislative halls from this degrading offence, but the reproach still rests upon the constituencies, and it is one that must be equally shared by the electors and the elected until corruption shall be happily purged out from every part of our political system.<sup>2</sup>

At last, after a protracted period of almost absolute sway, Walpole's supremacy in parliament came to an end. On February 3, 1741, a motion was made

His downfall.

in the House of Lords for an address to the king, praying him "to dismiss Sir Robert Walpole from his presence and councils for ever." In this debate it was vaguely asserted that Walpole had made himself for the past fifteen or sixteen years "sole minister." But this accusation was combated by the lord chancellor (Hardwicke), on the ground that it was an impeachment of the king's impartiality to suppose that he could permit any man, or minister, solely to engross his ear. And he added,

Proceedings  
against  
Walpole.

"It is very well known that this minister's recommendation does not always succeed, nor does his opinion always prevail in council; for a candidate has often been preferred in opposition to the candidate recommended by him, and many things have been resolved on in council contrary to his sentiments and advice."<sup>3</sup> The motion was negatived by a large majority. A protest was afterwards entered on the Journals, signed by thirty-one peers, who declared their conviction "that a sole, or even a first minister, is an officer unknown to the law of Britain, inconsistent with the constitution of this country, and destructive of liberty in any government whatsoever;" and that "it plainly appearing to us that Sir Robert Walpole has for many years acted as

<sup>1</sup> For an account of the rise and progress of parliamentary corruption in England, see Macaulay, *Hist. of Eng.* v. 3, p. 541, *et seq.*; May, *Const. Hist.* v. 1, ch. 6; Russell, *Speeches*, etc. v. 1, p. 26; Walpole, *Life of Perceval*, v. 1, p. 332.

<sup>2</sup> See Brougham, *Brit. Const.* pp. 61, 62; and Mr. Disraeli's observations on the causes and consequences of bribery; *Hans. D.* v. 187, p. 1324; *ib.* v. 194, p. 649; Rep. Com<sup>o</sup>. on Parliamentary Elections, Com. Pap. 1868-9, v. 8.

<sup>3</sup> *Parl. Hist.* v. 11, pp. 1083, 1126.

such, by taking upon himself the chief, if not the sole direction of affairs, in the different branches of the administration, we could not but esteem it to be our indispensable duty, to offer our most humble advice to his Majesty for the removal of a minister so dangerous to the king and the kingdom." The protest proceeded to allege various instances wherein Sir Robert Walpole had "grossly abused the exorbitant power which he illegally possessed himself of."<sup>1</sup>

Simultaneously with the motion in the Lords for the removal of Sir Robert Walpole, a similar motion was made in the House of Commons which attributed to Walpole entire responsibility for the misgovernment of the country, because he had "grasped in his own hands every branch of government; had attained the sole direction of affairs; monopolized all the favours of the crown; compassed the disposal of all places, pensions, titles, and rewards"—truly a scarcely exaggerated description of the almost despotic power of a constitutional premier. The line of defence adopted by Walpole was singular, and quite inconsistent with the modern doctrine of the right of parliament to control the fate of the king's ministers. He vindicated his conduct in office, accepting the full measure of his responsibility which had been imputed to him, but declared that "an address to his Majesty to remove one of his servants, without so much as alleging any particular crime against him, was one of the greatest encroachments that was ever made upon the prerogative of the crown;" and he called "upon all who respected the constitution, and the rights of the crown, to resist the motion." His speech produced a strong effect, and the motion was negatived by a large majority.<sup>2</sup> Nevertheless, the debates were instrumental in weakening the power of the great minister out of doors. A dissolution of parliament ensued; the elections went against Walpole, and after defeats in the new House of Commons on certain election questions, which were then considered as legitimate opportunities for a trial of party strength, the veteran statesman resigned all his offices, and retired to the House of Lords, with the title of Earl of Orford.<sup>3</sup> An attempt was, afterwards made to procure Walpole's impeachment, but it signally failed.<sup>4</sup> Since then

<sup>1</sup> *Parl. Hist.* v. 11, p. 1215.

<sup>2</sup> *Ib.* p. 1303.

<sup>3</sup> Mahon, *Hist. of Eng.* v. 3, pp. 101-155.

<sup>4</sup> *Ib.* pp. 180-187.

there has been no instance of an endeavour to proceed by impeachment against a minister of the crown for political offences not affecting his personal character.

After Walpole's retirement, in 1742, several years elapsed before there was any first minister who exercised more than a nominal control over his colleagues. The government was in the hands of the Whigs, and the Whig party of that day "displayed little ability for office, and much for division and intrigue."<sup>1</sup> Wilmington, Pelham, and Newcastle were successively first lords of the treasury, but they were all statesmen of an inferior order, and the cabinets over which they presided were weakened by intestine divisions, and struggles for the mastery.<sup>2</sup>

In 1744, however, under the Pelham administration, there occurred the first noticeable instance of a leading and important member of the cabinet being obliged to resign, because of political differences between himself and a majority of his colleagues. Lord Granville (previously known as Lord Carteret), one of the secretaries of state, and a favourite at court, jealous of the supremacy of Pelham, endeavoured to lead a party in the cabinet against him. But after being repeatedly repulsed, he declared that he could no longer submit to be outvoted and overruled on every point. Then, addressing the Pelhams, he said, "If you will take the government you may; if you cannot or will not, there must be some direction, and I will do it." At length matters came to a crisis, when the king, who was inclined to side with Lord Granville, appealed to Lord Orford for advice and assistance. He advised the king to take part with the majority of his cabinet. Whereupon his Majesty intimated to the chancellor his resolution that Lord Granville should resign.<sup>3</sup> These events speedily led to a reconstruction of the ministry, still under the presidency of Pelham, which was afterwards known as the "Broad-bottom" administration, because it comprised a grand coalition of all parties.

In 1756, Pitt (afterwards Earl of Chatham) became secretary of state. His commanding talents and decision of character made him at once the ruling spirit in the

<sup>1</sup> Donne, *Corresp. Geo. III.* v. 1, p. 37.

<sup>2</sup> Mahon, *Hist. of Eng.* v. 3, pp. 201, 503; v. 4, pp. 41, 54-57.

<sup>3</sup> *Bedford Corresp.* v. 1, pp. 25-35.



cabinet. At first, the Duke of Devonshire, and in the course of the year his grace of Newcastle, presided at the treasury; but the latter in returning to office was obliged to accede to Pitt's proposals, and to yield substantially the direction of public affairs into the great commoner's hands, while he continued to exercise the patronage appertaining to his rank as first minister of the crown.<sup>1</sup> The events which ushered in this administration are very curious, and reveal an extraordinary amount of intrigue and duplicity on all sides. George II. was not partial to Pitt, Newcastle was exceedingly jealous and afraid of him, Fox had been his formidable antagonist; and yet all of them were reluctantly compelled to agree to his assuming the reins of government, upon his own terms.<sup>2</sup>

Mr. Pitt's administration lasted for upwards of five years, and was most popular and successful at home and abroad. But after a time his colleagues, and especially the Duke of Newcastle, began to feel his yoke sit uneasily upon them, and to wince at the haughty and despotic conduct which he exhibited towards themselves as well as to his own subordinates in office.<sup>3</sup> In 1760, George III. ascended the throne, and among the changes consequent upon his accession was the introduction of Lord Bute, the personal friend and adviser of the king, into the cabinet. Bute was no admirer of Pitt, and determined to oust him from office. By his personal influence and intrigue, he was soon enabled to accomplish his purpose. Pitt came down to the council with a project for an immediate declaration of war against Spain. But only one member of the cabinet went with him; the rest protested against what seemed to them a rash and unwarrantable step. Pitt was left in a minority; whereupon, declaring that he had been called to the ministry by the voice of the people, to whom he considered himself as accountable for his conduct, and that he would not remain in a situation which made him responsible for measures he was no longer allowed to guide, he announced his intention of retiring from office. The president of the council, the veteran Lord Granville, expressed his regret at Pitt's determination; but added, "I cannot say I

<sup>1</sup> Jesse, *Life of Geo. III.* v. 1, p. 123; *Earl of Shelburne's Life*, v. 1, pp. 85, 91.

<sup>2</sup> Coxe's *Mem. of Walpole*, v. 4, pp. 146-162.

<sup>3</sup> Donne, *Corresp. Geo. III.* v. 1, p. xlviii.; Mahon, *Hist. of Eng.* v. 4, pp. 350, 359; v. 5, pp. 258, 271; Jesse, *Life of Geo. III.* v. 1, pp. 77, 81.

am sorry for it, since he would otherwise have certainly compelled us to leave him. But if he be resolved to assume the right of advising his Majesty, and directing the operations of the war, to what purpose are we called to this council? When he talks of being responsible to the people, he talks the language of the House of Commons, and forgets that at this board he is only responsible to the king. However, though he may possibly have convinced himself of his infallibility, still it remains that we should be equally convinced before we can resign our understandings to his direction, or join with him in the measures he proposes." After delivering his reasons in writing for adhering to the proposed course, Mr. Pitt, on October 6, 1761, resigned his seals of office into the hands of the king.<sup>1</sup> George III. was sorry to part with him; but said that upon the point in question he agreed so much with the majority of his council, that, if in this instance they had sided with Mr. Pitt, it would have been difficult for his Majesty to bring himself to yield to their opinion.<sup>2</sup>

Upon the retirement of his powerful rival, Newcastle hoped that he might become in fact what he had been Newcastle ministry. for five years in name only—head of the government. But he was doomed to be disappointed. His associates in office treated him with contempt, his subordinates with disrespect; his recommendations were disregarded by the king, and at last the crowning indignity was offered to him by the creation of seven new peers, without any previous consultation with him as first minister of the crown! Strange to say, he not only put up with this affront, but plaintively requested that his cousin, Thomas Pelham, might be added to the number. Bute, who had held the office of secretary of state, in conjunction with Mr. Pitt, took advantage of Newcastle's unpopularity, and of his own ascendancy at court, to assume the upper hand in the cabinet. His friends and adherents were the stronger party; and so, at length, on May 26, 1762, the timorous and despised old Duke of Newcastle thought it best to withdraw from office.<sup>3</sup>

On the resignation of Newcastle, Lord Bute immediately

<sup>1</sup> Mahon, *Hist. of Eng.* v. 4, p. 361; Donne, v. 1, pp. xlvi.—liii.

<sup>2</sup> Bedford, *Corresp.* v. 3, p. 48.

<sup>3</sup> Donne, v. 1, p. liv.; Jesse, *Geo. III.* v. 1, pp. 120–122; Mahon, *Hist. of Eng.* v. 4, pp. 365, 386.

got himself appointed first lord of the treasury. But his ministry was of very brief duration. He was unpopular in the country, and unable to control his own cabinet. Upon the plea that his health was suffering from the cares of state, he retired to avoid an overthrow.<sup>1</sup> George Grenville succeeded him as first lord of the treasury in 1763. Lord Macaulay is "inclined to think that his administration was on the whole the worst which has governed England since the revolution:" it was signalized by "outrages on the liberty of the people, and outrages on the dignity of the crown." Grenville endeavoured to coerce the king into yielding to him in everything; and, as both were self-reliant and obstinate men, the result was not productive of harmony. Neither were the ministers agreed amongst themselves, but were continually quarrelling, either about the distribution of patronage, or upon some matter of administrative business. Taking advantage of the growing weakness of this administration, the king dismissed it in 1765; and, with the aid of his uncle, the Duke of Cumberland, succeeded in forming a new ministry with the Marquis of Rockingham as first lord of the treasury.<sup>2</sup>

During their tenure of office, the Rockingham administration treated George III. with becoming respect, and conducted the affairs of the nation, if not with vigour, at any rate with uprightness and propriety. But unhappily the king did not reciprocate their good feeling, and Pitt stood aloof from them, so that their existence was weak and precarious. In the summer of 1766, they sustained a severe loss in the retirement of the Duke of Grafton, who was one of the secretaries of state, and the king determined upon getting rid of them. His majesty then applied once more to Pitt, and gave him a *carte blanche* to construct a new administration.<sup>3</sup>

In resuming the helm of the state, Pitt nominated the Duke of Grafton as first lord of the treasury, and took for himself the office of privy seal, with a seat in the House of Lords, as Earl of Chatham. Pitt's conduct as

<sup>1</sup> *Hist. of Eng.* v. 4, p. 387; *Donne*, v. 1, p. lviii.

<sup>2</sup> *Jesse, Geo. III.* v. 1, pp. 204, 278, 285-307; *Ed. Rev.* v. 126, p. 18; *Donne*, pp. 64, 68.

<sup>3</sup> *Ib.* pp. 69, 77.

head of this ministry was characterized by the same haughty spirit which he had formerly displayed in a similar position. Then, his ascendancy had been considerably greater than most prime ministers possess; now, it was not only great but paramount.<sup>1</sup> The Duke of Grafton contentedly acquiesced in his supremacy, but others took such offence at his imperious conduct that they retired from the ministry in dudgeon. Meanwhile the physical powers of Pitt began to give way, and he was disabled for months from attendance in the cabinet. In October, 1768, his growing infirmities compelled him to abandon his post, an event which was hastened by some misunderstanding with his colleagues, which had arisen out of his enforced retirement from active business. Until the month of March, 1767, he had been virtually prime minister; from that time he scarcely knew what was going forward. Even at the last, both the king and his own colleagues entreated him to continue in office; but he was resolute, and though he survived for ten years longer, and resumed his attendance in the House of Lords, he never again took a share in the king's councils.<sup>2</sup>

Upon the retirement of Chatham, the Duke of Grafton became for a time the actual head of the administration. Internal dissensions, however, soon brought his ministry to an end; and, in February, 1770, Lord North, who had been chancellor of the exchequer since February, 1767, was appointed first lord of the treasury.

Six prime ministers had preceded Lord North, within the first ten years of this reign, but his ministry lasted longer than all of them combined. It continued in existence for upwards of eleven years, being sustained by the favour of the king and the suavity of its gentle and good-humoured chief. The most potent cause of North's success was undoubtedly his influence over the House of Commons. He was thoroughly conversant with the practice of parliament, and an adept in the art of controlling a popular assembly. Ready-witted, dexterous, and agreeable as a speaker, he could always maintain his ground, even against the phalanx of wit and eloquence that was generally arrayed against him; and yet

<sup>1</sup> Mahon, *Hist. of Eng.* v. 5, p. 271; Jesse, *Geo. III.* v. 1, p. 389.

<sup>2</sup> Donne, v. 1, p. lxxx.; Mahon, *Hist. of Eng.* v. 5, p. 308; Haydn, *Book of Dignities*, p. 94 n.

his public policy was weak and vacillating. His (published) correspondence with George III. affords abundant proof of the persistent interference of his Majesty with the details of government, both great and small, in every branch of the public service; and of Lord North's pliant submission to the king's will.<sup>1</sup> The North administration came to an end in 1782, and Lord Rockingham was appointed first lord of the treasury, and nominal chief minister. The king, who felt the loss of his favourite, Lord North, very keenly, was violently opposed to Lord Rockingham, whom he justly regarded as the nominee of the ultra-Whig party. He would have preferred Shelburne, but that nobleman declined to undertake the formation of a ministry, and advised the king to send for Rockingham. The king was obliged to consent, and Lord Shelburne quitted the royal presence with full powers to treat with Lord Rockingham as to men and measures, and with the understanding that the latter nobleman should be at the head of the treasury. But so averse was the king to this arrangement, that he expressed his determination not to admit Lord Rockingham to an audience until he had completed the construction of the cabinet. This mark of royal displeasure would have induced Lord Rockingham to decline the proffered honour, had he not been urged by his friends to forego his objections. Accordingly, on March 27, he waited upon the king to submit the names of the proposed ministry. It comprised Lord Shelburne and Mr. Fox, as secretaries of state, and an equal number of the Shelburne and Rockingham parties. These discordant elements refused to amalgamate, and naturally produced dissensions in office and differences in parliament. Such, however, were the abilities and popularity of Fox, that he was generally considered as the principal person in this ministry, and, had he been so disposed, he might easily have attained an acknowledged pre-eminence. In proof of the small estimation in which Lord Rockingham was held, it is stated that, while it is the admitted right of the prime minister to "take the king's pleasure" upon the creation of peers, Mr. Dunning received a peerage on the advice of Lord Shelburne, and without the knowledge of the chief minister; who, as soon as he became

<sup>1</sup> Donne, v. 2, pp. 399, 450; Jesse, *Life of Geo. III.* v. 1, p. 487.

aware of the circumstance, applied to his Majesty for a similar favour on behalf of another lawyer, Sir Fletcher Norton.<sup>1</sup>

After the death of Lord Rockingham, in July, 1782, the king appointed Lord Shelburne first lord of the treasury; whereupon his colleague, Fox, immediately resigned. Fox accused Shelburne of gross and systematic duplicity towards his brother ministers, and particularly to himself when they were secretaries of state together; and now, in the words of his friend, Edmund Burke, he appeared to feel "the utter impossibility of his acting for any length of time as a clerk in Lord Shelburne's administration."<sup>2</sup> A letter written by Grenville, in December, 1782, mentions "Lord Shelburne's evident intention to make cyphers of his colleagues."<sup>3</sup> But in the ensuing February this ministry came to an end. Then followed the brief and inglorious episode of the coalition administration of Fox and North, which was nominally under the presidency of the Duke of Portland, but in which Fox, who held the seals as secretary of state, was virtually supreme.<sup>4</sup> The preparation of an unpopular measure for the government of India occasioned the downfall of this ministry.<sup>5</sup> In December, 1783, it received its dismissal from the king, and was succeeded by the powerful administration of Mr. Pitt, which lasted from 1783 to 1801.

The method of government by departments—which was in vogue before the revolution, and was still in operation during the period we have been passing under review—enabled the sovereign to exercise a more direct influence in all the details of government than would have been possible under a united administration subordinated to a political head. In fact, it gave to the occupant of the throne that general superintendence over all departments of state which is now exercised by the prime minister. But this bureaucratic system excited much dissatisfaction in parliament. In 1781 the existing governmental arrangements were strongly denounced in both Houses. The

Government  
by departments  
still prevailing.

<sup>1</sup> Jesse, *Geo. III.* v. 2, pp. 352, 373; Adolphus, *Hist. Geo. III.* v. 3, pp. 348, 349. Cf. the same story in connection with the Duke of Newcastle, *ante*, p. 272.

<sup>2</sup> Russell's *Corresp. of Fox*, v. 1, p. 457; Jesse, *Geo. III.* v. 2, p. 380.

<sup>3</sup> *Buckingham Pap.* v. 1, p. 84.

<sup>4</sup> Russell's *Life of Fox*, v. 2, p. 4; *Corresp. of Fox*, v. 2, p. 95.

<sup>5</sup> See *ante*, p. 62; Russell's *Life of Fox*, ch. 18.



Duke of Richmond declared "that the country was governed by clerks, each minister confining himself to his own office ; and, consequently, instead of responsibility, union of opinion, and concerted measures, nothing was displayed but dissension, weakness, and corruption."<sup>1</sup> Upon the formation of the coalition ministry, in 1783, at a private meeting which took place between the new allies on February 14, Mr. Fox insisted "that the king should not be suffered to be his own minister ;" to which Lord North replied, "If you mean that there should not be a government by departments, I agree with you ; I think it a very bad system. There should be one man, or a cabinet, to govern the whole, and direct every measure. Government by departments was not brought in by me ; I found it so, and had not vigour and resolution to put an end to it. The king ought to be treated with all sort of respect and attention, but the appearance of power is all that a king of this country can have. Though the government in my time was a government by departments, the whole was done by the ministers, except in a few instances."<sup>2</sup> Lord North's doctrine in respect to the authority of the crown was greatly in advance of his time. But, whatever theoretical opinions might be entertained by his responsible advisers on the subject, the king himself, taking advantage of the system which Lord North condemned, lost no opportunity of exercising the authority which he believed to be the proper appurtenance of the regal office, so as to be, in fact, "his own minister."

When, however, Pitt, at the earnest solicitation of the king, consented to take the chief direction of the state, <sup>Mr. Pitt's</sup> the constitutional relations between the sovereign <sup>ministry.</sup> of England and his ministers underwent a change, and began gradually to assume their present aspect. Mr. Pitt's principles being thoroughly in accord with those of his royal master, the king was content to acquiesce in his judgment and conduct of affairs, so far as was consistent with a due regard to his own prerogative. While, so far as his colleagues were concerned, the commanding talents and indomitable energy of Mr. Pitt enabled him to assert, without hesitation or complaint, a supremacy in the cabinet councils that has ever since been

<sup>1</sup> *Parl. Hist.* v. 22, p. 651.

<sup>2</sup> Russell, *Corresp. of Fox*, v. 2, p. 38.

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*Geo. III.* v. 2, p. 380.

*Fox*, v. 2, p. 95.

the acknowledged right of the first minister of the crown, and, with the exception of the short-lived ministries of the Duke of Portland (1807-9), and of Lord Goderich (1827), their habitual practice.

The development of the office of prime minister in the hands of men who combined the highest qualities of statesmanship with great administrative and parliamentary experience—such as Sir Robert Walpole, the two Pitts, Sir Robert Peel, and Lord Palmerston, besides Spencer Perceval, and other party leaders of great ability but lesser note—has contributed materially to the growth and perfection of parliamentary government. By an easy gradation, the personal authority of the sovereign receded into the background, and was replaced by the supremacy of the prime minister. Ere the close of the reign of George III. it became an accepted maxim that the prime minister was the personal choice of the crown, and the minister in whom the sovereign reposed his constitutional confidence, whilst his colleagues in office should be selected by himself, subject, of course, to the approval of the crown.

Whilst this has been the effect of the development of the office of prime minister upon the position and authority of the sovereign, its result upon the condition of the cabinet has been no less important. In a conversation with Lord Melville on this subject, in the year 1803—which has been fortunately preserved—Mr. Pitt, who was then out of office, dwelt “pointedly and decidedly,” upon “the absolute necessity there is in the conduct of the affairs of this country, that there should be an avowed and real minister, possessing the chief weight in the council, and the principal place in the confidence of the king. In that respect (he contended) there can be no rivalry or division of power. That power must rest in the person generally called the first minister, and that minister ought (he thought) to be the person at the head of the finances. He knew, to his own comfortable experience that, notwithstanding the abstract truth of that general proposition, it is noways incompatible with the most cordial concert and mutual exchange of advice and intercourse amongst the different branches of executive departments; but still, if it should unfortunately come to such a radical difference of opinion, that no spirit of conciliation or

Development  
of the premier's  
office.

Utility of the  
premier's  
office.

concession can reconcile, the sentiments of the minister must be allowed and understood to prevail, leaving the other members of administration to act as they may conceive themselves conscientiously called upon to act under such circumstances.<sup>1</sup>

The office of prime minister, as it is now exercised, is a proof and a result of the necessity which exists in our political system for the concentration of power and responsibility in the hands of one man, in whom the sovereign and the nation can alike confide, and from whom they have a right to expect a definite policy and a vigorous administration. Nevertheless, strange to say, this office is still unknown, not only to the law, but also to the constitution, which, as was remarked in parliament in 1806, "abhors the idea of a prime minister."<sup>2</sup> Again, in 1829, an eminent statesman (Lord Lansdowne) observed that "nothing could be more mischievous or unconstitutional than to recognize in an Act of Parliament the existence of such an office."<sup>3</sup> Unrecognized by the constitution.

Legally and constitutionally no one privy councillor has, as such, any superiority over another. All are equally responsible for the advice they may tender to their sovereign; and, on the rare occasions when a cabinet determines its course by the votes of its members, the premier's vote counts for no more than that of any of his colleagues. Eight members of the cabinet, including five secretaries of state, and several other members of the government, take official precedence of him.<sup>4</sup> The prime minister is simply the member of the cabinet to whom the sovereign has thought fit to entrust the chief direction of the government.<sup>5</sup> But the choice of a premier, however necessary or notorious, must still be regarded as a matter of private understanding, there being no express appointment of any member of the administration to be the prime minister.

The premier may be either a peer or a commoner, indifferently.

<sup>1</sup> Stanhope, *Life of Pitt*, v. 4, p. 24.

<sup>2</sup> *Parl. Deb.* v. 6, p. 178; and Sir R. Peel's remarks in *Mir. of Parl.* 1829, p. 802; and *South Australia Leg. Coun. Jls.* 1872, p. 9.

<sup>3</sup> *Mir. of Parl.* 1829, p. 1167; and see Lord Holland's speech, *Ib.* p. 1164.

<sup>4</sup> Mr. Gladstone, *North Am. Rev.* v. 127, p. 206. [This, of course is only true when the prime minister is a commoner and holds the office of first lord of the treasury.—*Editor.*]

<sup>5</sup> See *Corresp. Will. IV. with Earl Grey*, v. 1, pp. 9, 117.

It was Mr. Canning's opinion that the prime minister should be in the House of Commons. Sir R. Peel, during the greater part of his career, held a similar conviction, but his experience in office, from 1841 to 1845, led him to a different conclusion, and induced him to believe that if the premier were in the House of Lords he would escape the enormous burden of toil and worry which renders the office, in the Commons, almost beyond human endurance.<sup>1</sup> During the hundred and thirty years which have elapsed since the accession of George III. the office has been held for about half the time by peers.

Premier may be a member of either House.

Usually the prime minister has held the office of first lord of the treasury, either alone or in connection with that of chancellor of the exchequer. Lord Chatham, it is true, never held either of these places; but, while he was Mr. Pitt, and at the time of his acknowledged supremacy in the cabinet—in 1757 to 1761—was a secretary of state. Afterwards, when he formed a new administration, in 1766, he himself (having then become Lord Chatham) filled the office of lord privy seal. Again, from September, 1761, to May, 1762, Lord Bute was premier, while holding the office of secretary of state. From that time till the formation of Lord Salisbury's first administration, the position of first minister of the crown was invariably connected with the office of first lord of the treasury.

With what office usually associated.

The selection of the advisers of the crown is a branch of the royal prerogative that must be exercised by the sovereign himself. It is perhaps the sole act of royalty which, under the existing constitution of the United Kingdom, can be performed by the sovereign of his own mere will and pleasure. But, by modern usage, it is understood that no one but the premier is the direct choice of the crown. He is emphatically and especially the king's minister, the one in whom the crown constitutionally places its confidence, but "he stands between his colleagues and the sovereign, and is bound to be loyal to both."<sup>2</sup> Accordingly, the privilege is conceded to him of choosing his own colleagues; subject, of course, to the approbation of the sovereign. The list of persons selected to compose the new ministry, and

The crown chooses the premier, who recommends his colleagues.

<sup>1</sup> Martin, *Pr. Consort*, v. 1, p. 266.

<sup>2</sup> Gladstone's *Gleanings*, v. 1, p. 242.

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who have consented to serve, is submitted to the king, who may approve or disapprove of it, in whole or in part, even to the exclusion from office of any one personally objectionable to himself.<sup>1</sup> And, when any vacancy occurs in an existing ministry, it is the privilege of the prime minister to recommend some one chosen by himself to fill up the same. If his colleagues differ with him in the selection he has made, they must either acquiesce in the choice or resign their own offices.<sup>2</sup> In like manner, as it appertains to the prime minister to recommend his colleagues in office when they are appointed, he is also fully entitled, at any future time, to recommend to the crown any changes or removals which he may deem proper.<sup>3</sup>

In forming an administration, however, the prime minister can scarcely be regarded as unfettered in the choice of his colleagues, inasmuch as he is obliged to select them from amongst the most prominent and able men of his own party who are likely to command the confidence of parliament. It has been well observed, that "the position of most men in parliament forbids their being invited to the cabinet; the position of a few men ensures their being invited. Between the compulsory list, whom he must take, and the impossible list, whom he cannot take, a prime minister's independent choice in the formation of a cabinet is not very large; it extends rather to the division of the cabinet offices than to the choice of cabinet ministers. Parliament and the nation have pretty well settled who shall have the first places; but they have not discriminated with the same accuracy which man shall have which place."<sup>4</sup>

When negotiations are set on foot between the sovereign and any statesman to whom he may be desirous of entrusting the direction of public affairs, such negotiations will naturally involve, to a greater or less extent, mutual stipulations and conditions. On the one hand, the sovereign may set forth the policy which, in his judgment, ought to be pursued for the national good; and it

<sup>1</sup> See Gladstone's *Gleanings*, p. 332. [The right of the crown to exclude any one depends, of course, on the prime minister agreeing to such exclusion. The crown, in all things, being compelled to adopt the minister's advice, or to seek another minister.—*Editor*.]

<sup>2</sup> Stanhope, *Life of Pitt*, v. 4, p. 288.

<sup>3</sup> Ashley, *Life of Palmerston*, v. 2, p. 330.

<sup>4</sup> Bagehot, *Eng. Const.* p. 13.

Selection of  
 men to form a  
 ministry.

Stipulations  
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will be for the consideration of the statesmen who are invited to accept office upon these terms, whether they are in a position to carry out such a policy, consistently with their own convictions, their party obligations, and their assurance of adequate parliamentary support. On the other hand, an incoming ministry are warranted in requiring from the king, as a condition to their acceptance of office, any assurances which are not incompatible with the independence of the crown, or with the legitimate exercise of the royal prerogative. But a ministry have no right to bind either themselves or their sovereign by pledges in regard to proceedings in hypothetical cases; or to forestall their own advice in respect to contingencies that may afterwards arise.<sup>1</sup>

The cabinet is composed of the more eminent portion of the administration, but its numbers are indefinite and variable; for it is competent to the statesman who is charged with the formation of a particular ministry, with the consent of the sovereign, to determine the number of ministers who shall have seats in the cabinet.<sup>2</sup> The first cabinet of George I. consisted of eight members, of whom not more than five or six were in regular attendance, the others being either resident abroad, or not invariably invited to attend the council meetings.<sup>3</sup> The first cabinet of George III.

<sup>1</sup> See conduct of Pulteney, when George II. offered him full power to construct a ministry, after the resignation of Sir Robert Walpole, provided he would pledge himself to screen Sir Robert from prosecution (Mahon's *Hist. of Eng.* v. 3, pp. 162-165). In 1779, during the progress of the American war, George III. declared that he should expect a written declaration from all new ministers that they would persevere in the contest, and never consent to American independence (May, *Const. Hist.* v. 1, p. 42). But, in 1782, the House of Commons expressed such a decided aversion to a continuance of the war, that the king was obliged to agree that it should be abandoned (*Ib.* p. 48). In 1807, after the dissolution of the Grenville ministry, resolutions were submitted to both Houses, declaring "that it was contrary to the first duties of the confidential servants of the crown to restrain themselves by any pledge, express or implied, from offering to the king any advice that the course of circumstances might render necessary for the welfare and security of any part of the empire." The doctrine embodied in this resolution met with little opposition in either House, although as a matter of expediency, and to avoid collision with the new ministry, it was agreed that no direct vote should be taken thereupon.

<sup>2</sup> Yonge, *Life of Ld. Liverpool*, v. 3, pp. 210-212; Rep. Com<sup>o</sup>. on Official Sal. Com. Pap. 1850, v. 15; Evid. 1411.

<sup>3</sup> Mahon, *Hist. of Eng.* v. 1, p. 153.



(in 1760) consisted of fourteen members, of whom eight were of ducal rank, five earls, and but one a commoner.<sup>1</sup> In 1770, on the first formation of his ministry, Lord North introduced seven persons only into the cabinet. Lord Rockingham's cabinet, in 1782, consisted of nine or ten persons. That of Lord Shelburne, in the following year, of eleven.<sup>2</sup> In 1783 Mr. Pitt's cabinet was limited to seven members, of whom all, except himself, had seats in the House of Lords.<sup>3</sup> After the death of Mr. Pitt it became customary for the cabinet to consist of from ten to sixteen individuals. This number is "as large as it ought to be, and it seems to be generally adopted as such by both parties. There are general and other reasons which make it very undesirable to extend the number of the cabinet."<sup>4</sup> In fact, Sir Robert Peel, in 1835, expressed his opinion "that the executive government of this country would be infinitely better conducted by a cabinet composed of only nine members, than by one of thirteen or fourteen."<sup>5</sup> Mr. Disraeli, on forming his administration, in 1874, limited the cabinet to twelve, a restriction which was generally approved.<sup>6</sup> It was not until 1878 that, by the introduction of Lord Sandon (vice-president of the privy council) into the cabinet, the number was increased to thirteen.<sup>7</sup>

The following are officers of state who, according to modern usage, would, in any circumstances, form part of the cabinet, namely—the first lord of the treasury, the chancellor of the exchequer, the principal secretaries of state, now five in number, the first lord of the admiralty, and the lord high chancellor.<sup>8</sup> But it is also customary to include amongst the number the lord president of the council and the lord privy seal. Several other ministerial functionaries usually have seats in the cabinet; never less than three, and rarely so many as seven or eight, in addition to those above mentioned. Their

<sup>1</sup> Jesse, *Life of George III.* v. 1, p. 59.

<sup>2</sup> Bentham's Works, v. 9, p. 218 n.

<sup>3</sup> Stanhope's *Pitt*, v. 1, pp. 71, 165.

<sup>4</sup> Lord Granville, Rep. Com<sup>o</sup>. on Education, *Com. Pap.* 1865, v. 6; Evid. 1883.

<sup>5</sup> *Mir. of Parl.* 1835, p. 1797.

<sup>6</sup> Lord Granville, *Hans. D.* v. 219, p. 694; Mr. Forster, *Ib.* p. 1609; Mr. Gladstone, *Ib.* v. 280, p. 1954.

<sup>7</sup> *Fort. Rev.* v. 24, N.S. p. 265.

<sup>8</sup> Rep. on Off. Sal. *Com. Pap.* 1850, v. 15; Evid. 325. (Opinion of Sir Robert Peel.)

selection is made either from amongst such of the principal officers of state, and heads of departments, having seats in parliament, whose rank, talents, reputation, and political weight would be likely to render them the most useful auxiliaries; or from those whose services to their party, while in opposition, may have given them the strongest claims to this distinction. It has been aptly remarked that it is of the highest consequence that they should be men looking to the public good rather than to private advantage; sufficiently independent in their judgment to originate or adopt a progressive system of policy; and sufficiently independent in their personal character to resist the exactions of the sovereign, or the impulses of the people, when these are at variance with the permanent interests of the state.<sup>1</sup>

It occasionally happens that statesmen, possessed of high character and experience, are admitted to a seat in the cabinet without being required to undertake the labour and responsibility of any departmental office. This practice dates back to the reign of Charles I., when we find Hyde, afterwards Lord Clarendon, a member of the king's "inner cabinet," without office.<sup>2</sup> In 1757, we read that ex-Chancellor Hardwicke,<sup>3</sup> and, in 1770, that General Conway<sup>4</sup> were respectively members of the cabinet, without office, so also was Lord Camden, in 1798.<sup>5</sup> Of late years the practice has been of frequent occurrence. In 1807, Lord Fitzwilliam retained his seat in the cabinet in the Grenville administration, after resigning his office of president of the council.<sup>6</sup> In 1820, the name of Lord Mulgrave occurs in the list of cabinet ministers as given in the *Annual Register*, but without office. The Duke of Wellington was a member of the cabinet without office, on different occasions, for several years previous to his death. So also were the Marquis of Lansdowne and Lord John Russell, in 1854. Lords Sidmouth and Harrowby, moreover, continued in the cabinet after their resignation of office; the former remaining for two years, after resigning the home secretaryship in 1822, and until he retired

A seat in the cabinet without office.

<sup>1</sup> *Ed. Rev.* v. 108, p. 285.

<sup>2</sup> Campbell's *Chan.* v. 3, p. 132.

<sup>3</sup> *Ib.* v. 5, p. 143.

<sup>4</sup> Donne, *Corresp. George III.* v. 1, p. 12 n.

<sup>5</sup> *Life of Lord Minto*, v. 3, p. 8.

<sup>6</sup> Bulwer's *Palmerston*, v. 1, p. 37.

from public life; and the latter for a short period after his resignation of office in 1827.<sup>1</sup>

No constitutional rule is violated by this practice. The sovereign, in the exercise of his undoubted prerogative, may summon whom he will to the privy council; and any member of this body is eligible

Seat in the cabinet without office.

to a seat in the cabinet. But, while the principal executive officers of state are necessarily included in the cabinet council, it would be an undue limitation of the choice of the crown to declare that none but such as were able and willing to take charge of an executive department should be permitted to sit therein. The choice of the sovereign should only be restricted in respect of persons who hold offices that are constitutionally incompatible with the position of a responsible adviser of the crown, or who have not and cannot obtain a seat in parliament.

It is true that the appointment of a member of the House of Commons to a seat in the cabinet, without office, is open to greater objection than in the case of a peer. For the spirit of the statute of Anne would seem to require that all members accepting ministerial functions should offer themselves to their constituents for re-election.<sup>2</sup> But the letter of the law is undoubtedly applicable to such members only as have accepted salaried offices, and the instances above quoted, of General Conway and Lord John Russell, are sufficient to prove that there has been no disposition on the part of the House of Commons to enforce a strained interpretation of the law in this respect.<sup>3</sup>

In former times, when the members composing the cabinets, for the time being, were generally unknown, except by means of the offices they held, it is possible that such a practice might have given rise to abuse; but nowadays there is a sufficient safeguard in the public notoriety which attaches to the person of every cabinet minister, and in the fact that he receives his appointment, not merely that he may preside over

<sup>1</sup> Haydn's *Book of Dig.* pp. 88, 96; Pellew's *Life of Sidmouth*, v. 3, p. 396.

<sup>2</sup> See Mr. Walpole, in *Hans. D.* v. 130, p. 383.

<sup>3</sup> [Lord John Russell accepted office for a short time in order that he might vacate his seat, and submit himself to re-election. But Lord J. Russell's was an exceptional case, as he was not merely a member of the cabinet, but also leader of the House of Commons.—*Editor.*]

a particular executive department, but chiefly in order that he may be a mouthpiece and champion of the government in one or other of the Houses of Parliament. And, should circumstances render it advisable to have recourse to such a proceeding, it is as strictly constitutional for parliament to address the crown for the removal of a particular person from the list of the privy council, whether he be an office-holder or not, as it is to ask for the dismissal of a ministry on the ground that it has forfeited the confidence of parliament.<sup>1</sup>

In addition to the officers of state above enumerated, of whom the cabinet council is now composed, there are two or three other functionaries who formerly used to be occasionally included in the cabinet, but who have ceased of late years to be considered as eligible for that position. Of these, the most important example is that of the lord chief justice of the Court of King's Bench.<sup>2</sup>

Who ought not  
to be in the  
cabinet.

Judicial  
officers.

<sup>1</sup> See the case of *Ld. Melville*, in 1805, *Parl. Deb.* v. 4, pp. 335, 344-355; *Stanhope, Life of Pitt*, v. 4, pp. 283, 294.

<sup>2</sup> Lord Hardwicke, in 1737, while lord chief justice of the Court of King's Bench, was appointed lord chancellor, with a seat in the cabinet, but did not resign his chief justiceship until nearly four months afterwards (*Harris's Life of Hardwicke*, v. 1, p. 358). Afterwards, Lord Mansfield sat in the cabinet for several years, while he was lord chief justice. In 1806 the prime minister, Lord Grenville, appointed Lord Ellenborough, then chief justice of the King's Bench, lord president of the council, with a seat in the cabinet. Soon afterwards a resolution was proposed in the House of Lords, on March 3, that it was highly inexpedient, and tended to weaken the administration of justice, to summon to any committee or assembly of the privy council any of the judges of his Majesty's courts of common law. On the same day three resolutions were proposed in the House of Commons, which set forth that it was "highly expedient that the functions of a minister of state, and of a confidential adviser of the executive measures of the government, should be kept distinct and separate from that of a judge at common law;" and that the summoning of the lord chief justice to this position was "peculiarly inexpedient and unadvisable, tending to expose to suspicion, and bring into disrepute, the independence and impartiality of the judicial character, and to render less satisfactory, if not less pure, the administration of public justice." The resolutions were rejected in the Lords without a division, and in the Commons by a large majority; and, fortified by the decision of parliament in his favour, Lord Ellenborough retained for a while his place at the council board; but before the end of the year a change of ministry occurred, which compelled him to relinquish it. The mature and unbiassed opinion of parliament upon the question may be gathered from a debate in the House of Lords on July 7, 1837, upon the Lords Justice Bill, wherein the union of political functions with those of

The archbishop of Canterbury appears in the list of cabinet ministers during the administration of Sir <sup>Archbishop of</sup> Robert Walpole, though not as a member of the <sup>Canterbury.</sup> "interior council."<sup>1</sup> Contemporary memoirs represent him, at this period, as taking an active part in politics, and conferring with his colleagues on affairs of State.<sup>2</sup> But we may safely conclude that no similar appointment would now take place, not only because of the altered relations between the Established Church and the State, arising out of the Roman Catholic Emancipation Act, and the repeal of the civil disabilities of dissenters, but on account of the altered state of public opinion in reference to the active participation of clergymen in political affairs.<sup>3</sup>

The office of commander-in-chief is one which, when held by the Duke of Wellington, was associated with a <sup>Commander-in-chief.</sup> seat in the cabinet so long as his political friends were in power. Afterwards, when a Whig ministry came in, the duke was retained in office, but the post was made non-political; and has continued to be so regarded ever since. The office of master-general of the ordnance, abolished in 1855, was one of great dignity and importance. Up to 1821, the master-general was invariably a member of the cabinet, and it was his peculiar duty to advise and assist the government with reports and opinions upon military details connected with questions under their consideration.<sup>4</sup>

Having discussed the questions of the origin and composition of the cabinet council, and briefly considered <sup>Salaries of</sup> the various collateral points connected therewith, <sup>ministers.</sup> we have now to refer to the salaries and other emoluments appertaining to the offices held by the principal members of the administration. Formerly, the great offices of state were much more lucrative than at present. Various means existed, as by the possession of sinecures or reversions, or of fees and allowances, whereby the perquisites of office were increased. But all these have been abolished, in the gradual progress permanent judicial offices was unanimously reprobated by the highest legal and constitutional authorities.

<sup>1</sup> Haydn's *Book of Dig.* p. 92.

<sup>2</sup> Harris's *Life of Hardwicke*, v. 1, p. 383; v. 3, p. 453.

<sup>3</sup> See Holy Orders, as disqualifying for the House of Commons or the Bar (*Law Mag.* N.S. v. 13, p. 1; *Hans. D.* v. 195, p. 1466; v. 196, p. 746.

<sup>4</sup> Clode, *Mil. Forces*, v. 2, pp. 206, 242, 767.



of economic reform. Up to about the year 1825 there used to be an allowance to the first minister, and to each of the secretaries of state, for a certain amount of plate, by way of outfit, on their first accepting office. This was paid for out of the civil list; but it has since been taken away, together with all fees and gratuities of every kind.<sup>1</sup> Since 1830 the salaries of the prime minister, of the chancellor of the exchequer, and of the principal secretaries of state have been severally fixed at 5000*l.* per annum; that of the first lord of the admiralty at 4500*l.*, and those of the other heads of administrative departments generally at 2000*l.* per annum. This reduction was effected at the instigation of ministers themselves. Immediately upon the Grey ministry acceding to office, they placed the amount of their respective salaries under the consideration of a committee of the House of Commons, and accepted the recommendations for reduction which were made by that committee.<sup>2</sup> These salaries come under the revision of parliament every year, as they are included in the estimates, and voted in supply. In 1850 the official salaries again underwent examination by a committee of the House of Commons, but the committee were of opinion that, with scarcely an exception, the salaries of the chief administrative offices "were settled in 1831 at the lowest amount which is consistent with the requirements of the public service."<sup>3</sup>

Most of the leading statesmen of the day were examined before the committee in 1850, and they concurred in the foregoing opinion, alleging, with regard to the offices for which a salary of but 2000*l.* a year is given, that they did not compensate the parties holding them, and offer no pecuniary inducement to public men for their acceptance.<sup>4</sup>

Necessity for  
adequate  
salaries to  
ministers.

Without advocating the increase of existing salaries, it was urged on behalf of their present rate, that it is of the greatest public advantage that men of ability, of small private means, should be

<sup>1</sup> Rep. on Official Sal. *Com. Pap.* 1850, v. 15; Evid. 271, 272.

<sup>2</sup> *Mir. of Parl.* 1833, p. 617.

<sup>3</sup> Rep. on Official Sal. *Com. Pap.* 1850, v. 15, p. v.; May, *Const. Hist.* v. 2, p. 589; and see an article on the Pay of Ministers of the Crown, in *Journal of State Soc.* v. 20, p. 102.

<sup>4</sup> Rep. on Official Sal. *Com. Pap.* 1850, v. 15; Evid. 91.



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enabled to enter into public employment, without being placed in an unfair position towards such of their colleagues as might possess private fortunes. Some of the most eminent statesmen of the past century were notoriously men of very small private incomes, as for example the two Pitts, Fox, Burke, Canning, and Huskisson.<sup>1</sup>

In his evidence before the committee, Sir Robert Peel quoted, with marked approbation, the following opinions of Edmund Burke upon the question at issue: "What is just payment for one kind of labour, and full en-  
 discouragement for one kind of talents, is fraud and discouragement to others: many of the great  
 officers have much to do, and much expense of representation to maintain; a secretary of state, for instance, must not appear sordid in the eyes of the ministers of other nations; neither ought our ministers abroad to appear contemptible in the courts where they reside. In all offices of duty there is, almost necessarily, a great neglect of all domestic affairs; a person in high office can rarely take a view of his family house. If he sees that the state takes no detriment, the state must see that his affairs should take as little. I will even go so far as to affirm, that, if men were willing to serve in such situations without salary, they ought not to be permitted to do it. Ordinary service must be secured by the motives to ordinary integrity; I do not hesitate to say, that that state which lays its foundation in rare and heroic virtues, will be sure to have its superstructure in the basest profligacy and corruption. An honourable and fair profit is the best security against avarice and rapacity, as in all things else a lawful and regulated enjoyment is the best security against debauchery and excess."<sup>2</sup>

Burke's  
 opinions on  
 salaries.

In addition to their salaries, certain of the ministers are entitled to an official residence. This privilege was  
 formerly granted to a number of persons in the  
 public service upon insufficient and unwarrantable grounds.<sup>3</sup>  
 But, consequent upon an inquiry into the matter by the House of Commons in 1834,<sup>4</sup> it was afterwards limited, so far as the administration is concerned, to the first lord of the treasury,

<sup>1</sup> Rep. on Official Sal. *Com. Pap.* 1850, v. 15; Evid. 260, 261.

<sup>2</sup> *Ib.* 328.

<sup>3</sup> *Com. Pap.* 1831-2, v. 26, p. 551.

<sup>4</sup> *Ib.* 1834, v. 11, pp. 449, 453.

the chancellor of the exchequer, the first lord of the admiralty, the secretary, and two or three of the junior lords of the admiralty.<sup>1</sup> The foreign secretary used to be allowed a house, if he chose to take it, but none have done so since Mr. Canning.<sup>2</sup> In fact, the establishment at the old Foreign Office was such that every vacant space in the building was occupied. In the new Foreign Office, recently erected, no provision has been made for a residence for the foreign secretary, but the building contains reception-rooms, which may be used by that functionary or by other ministers.<sup>4</sup> The reason alleged, why no residences have been provided for the home secretary and other responsible chiefs of important administrative departments, is not one of principle, but that convenient houses could not be found for more than a certain number of ministers.<sup>5</sup>

Provision is made by an Act passed in 1834, and amended in 1869, for the grant of pensions to retiring members of an administration, varying in amount from £1000 to £2000 per annum, according to the importance of the particular office. The statute, however, confers no absolute title to a pension. It only empowers the prime minister to grant one, at his discretion, and on his own responsibility. To warrant the grant of a political pension it is necessary that the applicant should have been in the service of the crown for at least four years, and that he should declare that his private income is inadequate to maintain his station in life. Moreover, a limited number only of such pensions may exist at any one time. The term of service to entitle to a pension need not be continuous, but may be made up at different periods, and in different offices, during the public career of the minister.<sup>6</sup>

<sup>1</sup> Rep. on Official Sal. *Com. Pap.* 1850, v. 15; Evid. 87.

<sup>2</sup> *Ib.* 76, 248.

<sup>3</sup> *Ib.* 2889.

<sup>4</sup> *Hans. D.* v. 171, p. 374.

<sup>5</sup> Rep. on Official Sal. *Com. Pap.* 1850, v. 15; Evid. 75.

<sup>6</sup> *Ib.* Evid. 104, 105; 4 & 5 Will. IV. c. 24; 32 & 33 Vict. c. 60; *Hans. D.* v. 196, p. 874; v. 197, p. 537; *Com. Pap.* 1869, v. 34, p. 355.

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